

No. 113

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In the Supreme Court of the United States

October Term, 1922.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

FADA GEORGE, Administratrix of the Estate of
John C. Groeger, Deceased,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS, MOTION,
NOTICE AND BRIEF.

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J. P. WOOD,

J. W. BEAVER,

Of Counsel.

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THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

FREDA GROEGER, Administratrix of the Estate of
John C. Groeger, Deceased,
Respondent.

**PETITION FOR WRIT OF CERTIORARI, MOTION,
NOTICE AND BRIEF.**

S. H. TOLLES,
Counsel for Petitioner.

W. T. KINDER,
J. P. WOOD,
J. W. REAVIS,
Of Counsel.

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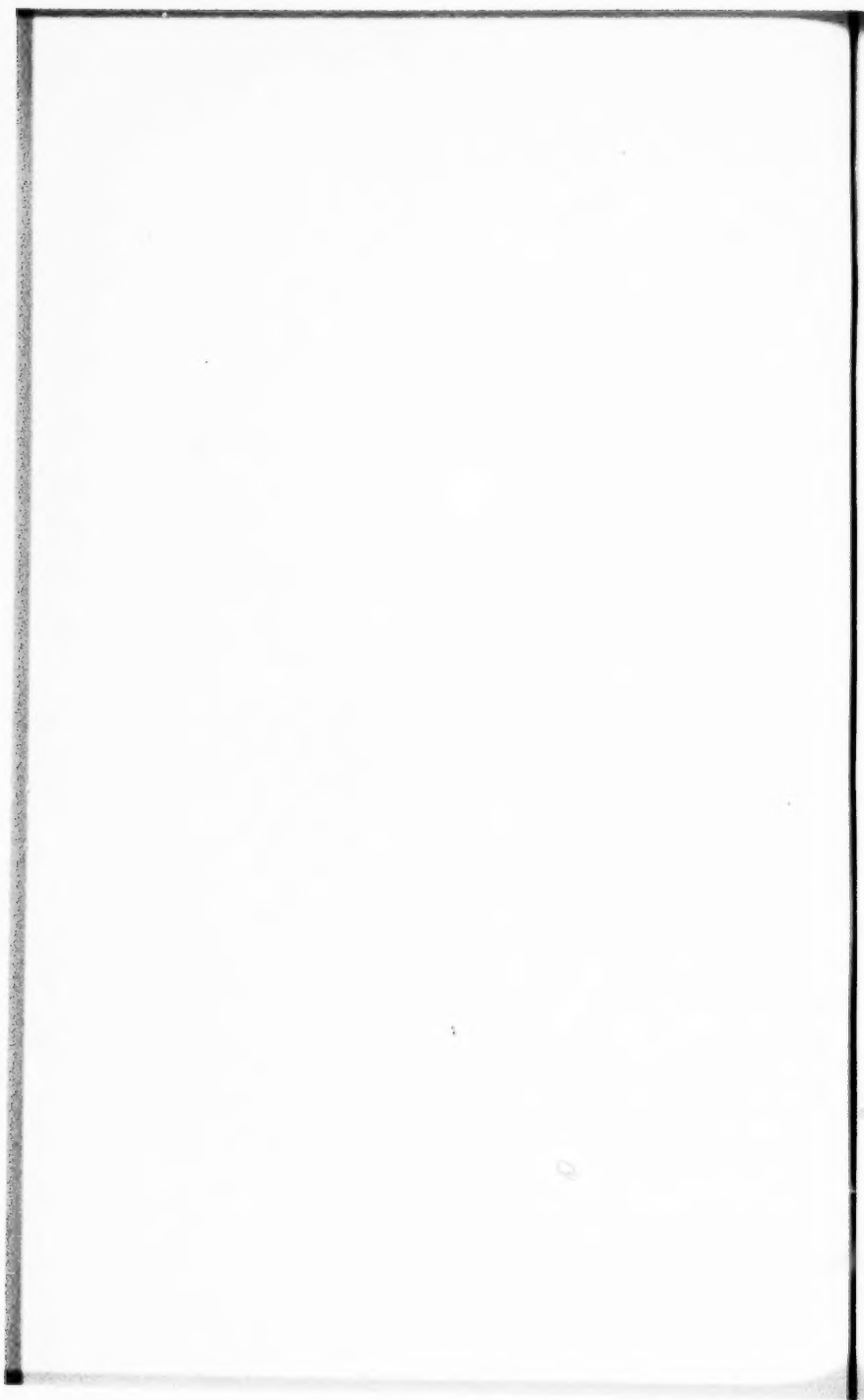
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Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

The petition of The Baltimore and Ohio Railroad Company, for a writ of certiorari directed to the United States Circuit Court of Appeals for the Sixth Circuit, to bring before the Supreme Court the case of

THE BALTIMORE AND OHIO RAILROAD COMPANY,	}
<i>Petitioner,</i>	
VS.	}
FREDA GROEGER, Admx. of the Estate of	
John C. Groeger, Deceased,	
	<i>Respondent.</i>

The said petitioner respectfully shows to the Court as follows:

(1) On February 15, 1921, the respondent brought an action against the petitioner in the United States District Court for the Northern District of Ohio, Eastern Division, to recover damages as administratrix of the Estate of John C. Groeger, deceased, for the alleged wrongful death of the said deceased caused by the explosion of the boiler of a locomotive of the petitioner which the deceased was operating as an engineer in its employ. On November 26, 1921, the respondent by leave of court filed an amended petition in said action.

(2) The action was brought under the Federal Employers' Liability Act of April 22, 1908, and its amendments, and the Federal Boiler Inspection Act and its amendments of 1915. The answer of the petitioner admitted that at the time of the decedent's death both he and it were employed in interstate commerce and the right of action asserted must, consequently, be governed and defined by the Federal statutes noted in so far as they are applicable.

(3) The facts of the case are briefly as follows: On the morning of September 3, 1920, John C. Groeger, an engineer employed by the petitioner and in charge of Engine No. 2541, left Holloway, Ohio, with a train for Brooklyn Junction, West Virginia, crossing the Ohio

River at Wheeling and proceeding by way of Moundsville, Chestnut Hill, Foster's Tower and Proctor. At or near Proctor, West Virginia, some three miles beyond Foster's Tower, the boiler of the engine exploded, resulting in the death of Groeger, the engineer, the fireman and the head brakeman who constituted the engine crew at the time of the explosion.

The principal ground of recovery relied on by the plaintiff was the fact that the engine involved did not have installed therein a *fusible plug*, which is a brass plug "with a square on the bottom of it and drilled out either five or six small holes or one large hole and filled with Babbitt metal or pewter or some soft substance."

(R. 20) It is inserted just above the crown-sheet and

"acts as a supplemental safety valve * * * so that when the water gets low in the boiler the intense heat will allow this metal to become softened and run out * * * and water escapes and drowns out the fire."

It was conceded by the defendant that no such plug was used on this engine or on any other engine used on the Baltimore and Ohio system.

(4) The claims of negligence set forth in the respondent's amended petition (supplemental transcript of record) were substantially as follows:

"First. In permitting a dangerous condition to exist in said engine, in that the crown sheet of the boiler was defective by reason of being overheated prior to the explosion.

Second. In equipping said engine with a defective water glass indicator, in that it did not indicate the real height of the water in the boiler.

Third. In failing to furnish Groeger with a reasonably safe place in which to work.

Fourth. In failing to make adequate and sufficient inspection of the engine and its equipment.

Fifth. In failing to equip said boiler with a fusible plug.

Sixth. In permitting the use of unfit and improper water in the engine, in that said water contained foreign matter, causing foam and resultant incorrect indication in the gauge cock of the height of the water in the boiler."

The trial court took from the jury as being unsupported by any evidence the second assignment of negligence regarding the water glass indicator and the sixth assignment of negligence that improper water was used and consolidating the first, third, fourth and fifth assignments of negligence limited respondent's case to the jury to two claims of negligence, as follows: (R. 73)

"(1) Did the defendant permit or allow a dangerous, unsafe and insufficient condition to be and arise in and about the crown sheet of said boiler whereby it was weakened and became defective, unsafe and leaky; whether that was due to any or whatever cause, broken crown or stay-bolts or other causes, and if so, was the boiler explosion thereby caused in whole or in part. Plaintiff asserts that, and the defendant denies it. It will be for you to say under the evidence here, gentlemen, and the law as I state it to you, what the fact is in this respect."

(2) It being conceded that the defendant had failed to install and equip this locomotive engine with a fusible safety plug, it will be for you to say whether or not the standard of duty imposed by law upon the defendant, to see that any locomotive engine propelled by steam in use upon its road in interstate commerce was in a proper condition and safe to operate in the service to which it was put, that the same might be employed in the active service in moving traffic without unnecessary peril to life or limb, was violated by the failure to equip this engine with a fusible safety plug."

(5) The court also charged the jury—(Record 75 and 76)

“An interstate carrier, as well as any railroad carriers, owes the duty, of course, of availing itself of the best mechanical contrivances and inventions in known practical use which are or would be effective in making safe a locomotive boiler as against explosions. It is not bound to introduce a new appliance the moment somebody suggests it or discovers it, but is entitled to a reasonable time and opportunity to test it out and make any changes.

“Such I conceive to be the rules under which you are here to determine whether or not the standard of duty in making this engine safe did or did not require installation of a fusible plug. I say to you it is and was the duty of the defendant to avail itself of the best mechanical contrivances and inventions in known practical use which were or are effective in making the boilers safe as against explosions

* * *

“If you shall find, under the charge that I have given you, that a fusible safety plug was required by that standard, and that it was a mechanical means and contrivance in known practical use and effective more than was any other that had been installed by the defendant on this engine, then its absence would be a violation of the Boiler Inspection Act, and if the explosion resulted in whole or in part because of the absence of the fusible plug, and the decedent thereby met his death, plaintiff would be entitled to recover.”

(6) The trial resulted in a verdict in the sum of \$10,576 upon which the trial court entered judgment in favor of the respondent and against the petitioner in that amount (Record 8). Thereafter the petitioner filed a petition for writ of error (Record 97) and the same being issued (Record 107) the case was heard by the Cir-

cuit Court of Appeals for the Sixth Circuit and judgment entered by the trial court was affirmed.

(7) The petitioner asserts as error the judgment of the Circuit Court of Appeals affirming the action of the trial court in—

(a) Overruling the motions made by the petitioner to direct the jury to return a verdict in its favor at the close of the evidence introduced by the respondent (Record 44) and at the close of all the evidence in the case (Record 69);

(b) In leaving to the jury the question whether the failure of the defendant to equip the locomotive boiler with a fusible plug was a violation of the Federal Boiler Inspection Act, thus permitting the jury to determine the standard of the duty imposed by such statute and whether under such standard the defendant was negligent, and (which raises the same questions) in leaving to the jury the question whether the defendant permitted a dangerous, unsafe and insufficient condition to exist in and about the crown sheet of the locomotive boiler whereby it was weakened and became defective.

(c) In charging the jury that the defendant was required to avail itself of the best mechanical contrivances and inventions in known practical use which are or would be effective in making a locomotive boiler safe as against explosions.

(8) The petitioner avers that the present case is one in which it is proper for this Court to issue a writ of certiorari because the questions of law involved herein concern the construction and application of important statutes (the Boiler Inspection Act) of the United States and are substantially as follows:

(a) Whether the failure of the petitioner to equip such engine with a fusible plug was any evidence of a breach by it of the Federal Boiler Inspection Act warranting the trial court to submit the same to the jury.

(b) Whether there was any evidence in the case which would warrant the trial court in leaving to the jury the question whether the presence of certain broken stay-bolts in the engine contributed to the explosion thereof.

(c) Whether or not the Federal Boiler Inspection Act imposes on railroad companies the duty to use the best mechanical contrivances and inventions in known practical use which are or could be effective in making locomotive boilers safe against explosions.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Circuit commanding said court to certify and send to this Court on a date to be designated in said writ a full and complete certified transcript of the record of all proceedings of the said Circuit Court of Appeals in this case to the end that the said case may be reviewed and determined by this Court as provided by law and that your petitioner may have such other and further relief and remedy in the premises as to this Court may seem proper.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

By S. H. TOLLES,

Counsel.

STATE OF OHIO,
COUNTY OF CUYAHOGA, SS.

S. H. TOLLES, being first duly sworn, says that he is one of the attorneys for The Baltimore and Ohio Railroad Company, and makes this verification for and in its behalf and is thereunto duly authorized; that he read the foregoing petition and that the allegations therein are true as he verily believes.

S. H. TOLLES.

SWORN TO before me and subscribed in my presence
this 28th day of June, 1923.

J. W. REAVIS,
Notary Public.

**IN THE SUPREME COURT OF THE
UNITED STATES.**

October Term, 1922.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Petitioner,

vs.

FREDA GROEGER, Administratrix of the Estate of
John C. Groeger, Deceased,

Respondent.

MOTION.

Now comes The Baltimore and Ohio Railroad Company and moves this Honorable Court that it shall by writ of certiorari or other proper process directed to the United States Circuit Court of Appeals for the Sixth Judicial Circuit require said court to certify to this Court for review and determination a certain cause in said Court of Appeals lately pending wherein the petitioner, The Baltimore and Ohio Railroad Company was plaintiff in error, and the respondent, Freda Groeger, Administratrix of the Estate of John C. Groeger, deceased, was defendant in error and to that end now tenders herewith its petition and brief, together with a certified transcript of the record and proceedings in said Court of Appeals.

S. H. TOLLES,

Counsel for Petitioner.

**IN THE SUPREME COURT OF THE
UNITED STATES.**

October Term, 1922.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

VS.

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Respondent.

NOTICE.

To E. C. Chapman,

Counsel for the above named respondent:

Please take notice that on the 1st day of October, 1923, upon the opening of the court or as soon thereafter as counsel can be heard at the court room of the Supreme Court of the United States in the City of Washington, D. C., we shall submit to the Court a petition for a writ of certiorari directed to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, a copy of which said petition for writ of certiorari, motion and brief in support thereof are herewith delivered to you.

S. H. TOLLES,

Counsel for Petitioner.

The foregoing notice is hereby accepted by delivery of a copy thereof and of the petition for writ of certiorari, motion and brief in support of the petition, receipt whereof is acknowledged on the 28th day of June, 1923.

E. C. CHAPMAN,

Attorney for Respondent.

IN THE SUPREME COURT OF THE
UNITED STATES.

October Term, 1922.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

FREDA GROEGER, Administratrix of the Estate of
John C. Groeger, Deceased,
Respondent.

BRIEF ON BEHALF OF PETITIONER.

For convenience the petitioner will be herein referred to as the defendant and the respondent as the plaintiff.

The errors of the trial court complained of here are briefly stated as follows:

(1) *In leaving to the jury the question of the interpretation of the Federal Boiler Inspection Act;*

(2) *In leaving to the jury the question of whether or not the crown sheet of the boiler was in a dangerous or defective condition; and*

(3) *In charging the jury with regard to the asserted obligation of defendant to avail itself of the **best mechanical contrivances and inventions in known practical use** which are or might be effective in making the locomotive safe as against explosion.*

1. The Court's instructions to the jury on the matter of a fusible plug raises a question of the interpreta-

tion of the Federal Boiler Inspection Act, never decided by this Court and upon which an established authority should be had, namely, **whether the mere absence of a safety device from a locomotive which is not specifically required by the Federal Boiler Inspection Act and not required by any rule of the Interstate Commerce Commission adopted pursuant thereto is or can be evidence of a violation of the Federal Boiler Inspection Act, or, stated in other words, was it intended that the Boiler Inspection Act should be construed by each jury before whom cases involving the act are tried?**

The trial court left to the jury the question whether the absence of a fusible plug (also referred to as a safety plug) from the boiler of the locomotive which exploded was a violation of the Federal Boiler Inspection Act, using the following language:

“(2) It being conceded that the defendant had failed to install and equip this locomotive engine with a fusible safety plug, *it will be for you to say whether or not the standard of duty imposed by law upon the defendant, to see that any locomotive engine propelled by steam in use on its road in interstate commerce was in a proper condition and safe to operate in the service to which it was put, that the same might be employed in the active service in moving traffic without unnecessary peril to life or limb, was violated by the failure to equip this engine with a fusible safety plug.*”

The absence of a fusible plug is not a violation of the Federal Safety Appliance Act and the defendant submits that the Court erred in permitting the jury to find that it was a violation of the Boiler Inspection Act.

A fusible plug is described in detail by various witnesses. For example, McGann says (Record 20, 21):

"I have seen a fusible plug in locomotives. Its purpose is to warn the engineer in case of his negligence in allowing the water to become low in the boiler; it tells him he has lost his water. If the engineer in charge of the boiler on line of road finds water getting low, getting below a safe point, he draws the fire. A fusible plug is a brass plug with a square on the bottom of it and drilled out, either five or six small holes, or one large hole, and filled with babbitt metal or pewter, or some soft substance. The crown sheet is tapped out at the forward part, the highest part of the crown sheet, and this plug screwed in, extending above the sheet about one-half or three-quarters of an inch, so that when the water gets low in the boiler, the intense heat will allow this metal to become softened and run out in the lower part of the fire-box, and some water escapes and drowns out his fire, and makes an awful noise in the fire-box, and then he knows his water is low and he takes the precaution to draw the fire to save further damage. It acts as a supplemental safety valve, but they are considered unsafe, due to the fact that this accumulation of scale gets on this metal plug and while the water is still over this plug, or is on top of the soft metal, it allows it to come out, run out in the fire-box, and oftentimes causes serious injury and serious burns. I never knew, in my experience, the blowing out of a fusible plug to blow up the boiler. It is not as serious when the fusible plug melts out and allows the escape of the steam, as when the boiler blows up. The fusible plug is placed from half to three-quarters of an inch above the top of the crown sheet. When the water gets below the highest part of the fusible plug and before it reaches the crown sheet, it exposes the top of the fusible plug with the soft metal in it, and the soft and fusible metal will melt out before the bolts of the crown sheet."

and

"Fusible plugs are not in use on the Baltimore & Ohio Railroad System. When I was serving my apprenticeship, in 1902, they had them on the Cincinnati & Southern Railroad. I am not familiar with conditions obtaining on the New York Central or the Pennsylvania in regard to fusible plugs. I am not familiar whether they are in general use on standard railroads only from what I hear from other master mechanics, that they are not used on other roads. I don't know personally; I never worked for very many railroads. I have made inquiry and investigation in the railroad work to find out their place in the equipment and operation of engines, and the result is I find they have not gone into general use.

The objection to fusible plugs is they accumulate scale on top of the plug and this allows the metal to come out and causes the engine to fail and it is necessary to give up service on line or road. It oftentimes results in injuries to the crews; maybe the fireman is down putting in a fire, and if he should be firing there just at the time the metal comes out of the plug, that pressure in the boiler will blow the fire and hot cinders out of the fire-door, and it has proven very detrimental. The water and steam, when it comes out through the plug, comes down into the fire-box at a pressure of 175 to 200 pounds per square inch, throwing the fire and hot coals out of the fire-door. It has been determined to be unsafe, at least on the Baltimore & Ohio, I would say back as far as 1902 or 1903. Prior to that time, I think they were used; that was before my time, before 1906."

Boyden (Record 23) testifies:

"In railroad talk, a fusible plug is known as a soft plug. It is put into the highest point of the crown sheet, that is, the top of the inside of the

fire-box. There is a soft metal applied to this brass plug so that if the water gets low this metal will melt. It is used as an alarm or a safety device to the engineer to know that his water is low in his boiler. When the fusible plug operates, it relieves the pressure between the fire-box sheet and the outside wrapper sheet, so that a boiler cannot blow up.

I saw those fusible plugs in operation, directly, seven years that I was master mechanic. I used them on 178 engines on the Erie Railroad, during the period from 1912 to 1919. During that time I never had a boiler blow up, due to the safety plug. We have had plugs give out on the railroad due to poor workmanship in the applying of the soft metal in the plugs. I have never recalled of an engineer or fireman being injured due to this. I have heard there was a case, but I have never seen it."

Karnell (Record 40) testifies:

"The fusible plug is not in use on the New York Central System because it is not practical. Due to the water surging back and forth over locomotive crown sheets, we find that the tin in the fusible plug will fuse and melt, therefore permitting the water to get into the fire-box and putting out the fire. The movement of the locomotive in ordinary operation with plenty of water causes a movement of the water over the crown sheet back and forth, so that on a grade, or for other reasons, a fusible plug is impractical because it is bared; that is to say, the water leaves it at times due to the ordinary operation of the engine. When a plug blows out it blows out through the fire-box, permitting the water and steam in the fire-chamber. If the fireman at that time happens to be putting fire into the fire door, he does not necessarily get the fire and steam; but it would tend to put the fire out. I wouldn't say as to injuries happening to the fireman."

and on page 42 says:

"As a rule, in the general railroading world, all the railroad systems, they are not used. They have not been accepted and used by master mechanics and locomotive engineers as standard equipment in locomotive service."

Hedeman (Record 47 and 48) testifies:

"Fusible plugs are not used on the Baltimore & Ohio Railroad Company's engines. We have approximately 2700 engines. The system extends to St. Louis, Chicago, Philadelphia, Baltimore, with numerous branch lines.

I have made inquiries on the question of the use of soft plugs on locomotives other than the Baltimore & Ohio.

Fusible plugs are regarded as an encouragement to the engineer to not keep careful watch on his water, not keep as careful watch on the water as he would if he didn't have a fusible plug. In other words, he would rely to a certain extent on that fusible plug blowing out when the water got low, and if he wouldn't have the fusible plug he would be very careful with his water and watch his gauge cocks and water glass. When the fusible plug blows out the water and steam come out at the front end of the crown sheet and it blows it down on the fire."

CROSS EXAMINATION by Mr. Chapman.

"The B. & O. is the only railroad I am working for, I have not seen a fusible plug in use on the boiler of a locomotive engine. I know the purpose of it. Its purpose is when the plug would be exposed and not covered with water the soft metal would melt and come out and allow some water to escape. The plug won't prevent the water from getting down to the top of this crown sheet; it would give warning.

With a fusible plug in this boiler at the time of the explosion, all pressure within that boiler would not have been released by the action of that fusible plug before the water could get low and leave the peacock blue mark on the top of the crown sheet. When the fusible plug metal melted it would blow steam and water down and give warning. Theoretically, it would release the pressure in that boiler, but it would be negligible through that small hole. The force of the steam going through the holes in that fusible plug would be as nothing compared with the blowing up of that boiler. When the fusible plug blows out it gives warning that the water is low. It is self-evident that the danger of a fusible plug blowing out is nothing compared to the danger of the boiler blowing up."

Ayers (Record 51) testifies:

"The fusible plug is not in use upon the locomotive boilers of the Nickel Plate Railroad. During the course of my connection I have made a somewhat casual investigation, not particularly searching, into the extent of the use of fusible plugs on locomotive boilers. Without any definite figures to support my answer, it is my opinion that the use of the fusible plug in railroad work is not very general.

The American Railway Master Mechanics Association is now a part of the American Railway Association as a mechanical section. Prior to that time it was an association of railway motive power officials, that is, the master mechanics or similar officials of the various railroads had an association, in which they met and discussed their problems, made reports and recommendations, and, in addition, adopted standard practices and designs. Those standard practices and designs were not compulsory but they represented the consensus of opinion as to what was the best practice. This American

Railway Master Mechanics Association comprised representatives of nearly all the railroads in the country.

According to the proceedings of the American Railway Master Mechanics Association, they passed a resolution in 1899. Defendant's Exhibit 5 is a copy of the resolution as it appears in the 1917 and '18 proceedings of the American Railway Master Mechanics Association. It was adopted in 1899, and those things are carried forward from year to year in the proceedings. That was copied correctly directly from a printed copy of the proceedings, and reads as follows:

'Resolved that it is the sense of the American Railway Master Mechanics Association that the use of fusible plugs in the crown sheets of locomotive fire-boxes is not conducive to the prevention of the overheating of the crown sheet.'

Mr. Kinder: In view of the fact that the witness has read the resolution we will not offer it. That is all a part of the record."

It was claimed by the plaintiff that the absence of the fusible plug thus described constituted a violation of the Boiler Inspection Act, the pertinent provision of which is as follows:

"Sec. 2. From and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any common carrier, its officers or agents, subject to this act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic, *unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb*, and all boilers shall be inspected from time to time in accordance with

the provisions of this act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

While this duty thus defined is, we submit, clear, to-wit: the boiler and appurtenances must be in proper condition and safe to operate so that it could be used without unnecessary peril to life or limb, we suggest that such duty is not unlimited nor does it make the carrier an absolute insurer against any contingency which might result in injury or loss of life.

The phrase "proper condition and safe to operate" should be given the usual and ordinary meaning attached to such words having due regard for the connection in which they are employed. In other words, does this phrase impose on the carrier the duty of equipping an engine so as to protect an engineer against the consequences of his own negligence? It must be remembered that upon this record this engine was turned over to Groeger in "proper condition and safe to operate" but for the fact that he permitted a condition of low water.

An examination of the other sections of the Boiler Inspection Act supports this view of the law. For example the closing phrase of Section 2 provides:

"And all boilers shall be inspected from time to time in accordance with the provisions of this act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

An examination of Sections 3, 4, 5 shows that there is thereby created an organization of inspectors including a chief inspector. With this official the carriers are directed to file their rules and instructions for the inspection of locomotive boilers (Section 5). Thereafter

the Interstate Commerce Commission upon hearing must approve such rules and instructions. In fact, the provisions of Sections 5 and 6 indicate an intent on the part of Congress to have not only the matter of boiler inspection but boiler construction determined and passed on by the Interstate Commerce Commission. In this connection the following significant language appears in Section 6:

“His (referring to the inspector) first duty shall be to see that the carrier make inspections in accordance with the rules and regulations established or approved by the Interstate Commerce Commission and *that carriers repair the defects which such inspections disclose before the boiler or boilers or appurtenances pertaining thereto are again put in service.*” (Italics ours.)

Again:

“When any district inspector shall in the performance of his duty, find any locomotive boiler or apparatus pertaining thereto *not conforming to the requirements of the law or the rules and regulations established and approved as hereinbefore stated*, he shall notify the carrier in writing that the locomotive is not in serviceable condition and thereafter such boiler shall not be used until in serviceable condition.”

This and other provisions of the various sections of the Boiler Inspection Act clearly in our opinion disclose an intent by Congress that the Interstate Commerce Commission should be clothed with a greater authority and duty than merely an inspection of boilers and providing rules and regulations in that regard. The right to inspect and regulate includes, we submit, the authority to say and determine what constitutes a defect or unsafe condition, otherwise the Inspection Act is without

meaning. The act would be a futile thing if upon inspection the Commission could not deal with a defect or unsafe condition developed by such inspection. But as pointed out in the provisions just quoted, the Commission is expressly given the authority to hold out of service any locomotive boiler or apparatus—

“not conforming to the requirements of the law or the rules and regulations, etc.”

We, therefore, submit that the question of whether a boiler not equipped with a fusible plug was a violation of Section 2 of the Act was a question for determination by the Interstate Commerce Commission under the power given and duties imposed upon it by the sections above referred to.

In this connection, this record shows that the Commission did not require that locomotive boilers be equipped with fusible plugs. The court so charged the jury. (Record 74-75)

It is to be kept in mind, moreover, that the non-use of a fusible plug by the Company does not involve dangerous or defective construction so far as the boiler or locomotive itself is concerned; nor does it involve a question of inadequate or defective design, or the use of improper appliances in the make-up or construction of the particular boiler. This case involves solely the non-use or absence in a boiler of an appliance otherwise unnecessary, the use of which is to protect the engineer from the result of his own negligence and disregard of duty owed not only to his employer but also to his fellow employees. In this connection the Court will again recall that the Company had turned this engine over to Groeger in first class condition so far as the operating appliances, gauge cocks, water glasses, etc., were con-

cerned, and it therefore follows that Groeger had at hand all the necessary appliances by means of which he could determine and control the height of the water in this boiler and thus prevent the disaster which occurred.

This view of the meaning and intent of the Boiler Inspection Act was not adopted by the learned trial judge under whose charge the jury was constituted a tribunal not only as to the facts but also as to the law, i. e., as to the nature and extent of the obligation imposed by Section 2 of the Boiler Inspection Act.

The Court's charge and exceptions taken thereto clearly raise the legal question existing as to the proper construction and effect of the Boiler Inspection Act as applied to this case.

In effect the Court left to the jury to determine— (1) what standard of duty was imposed by the Act, i. e., what was the meaning of the phrase in the Act "proper condition and safe to operate" and "without unnecessary danger to life and limb"; and (2) to determine, having found that standard, whether or not the standard required a fusible plug.

The error into which the Court fell resulted, we submit, from (1) its construction of the terms of the Boiler Inspection Act and (2) its assumption that under the act so construed the failure of the Interstate Commerce Commission to require a fusible plug left the question open to each jury in a particular case to say whether or not the use or non-use of this kind of an appliance was or was not negligence; and (3) the Court's misapprehension of the scope of the decision in *Railway Co. vs. Donaldson, Admx.*, 246 U. S. 121.

An examination of this case will show that while the non-use of a fusible plug was assigned as negligence the

question of the scope and intent of the Boiler Inspection Act was not considered nor did the record present as this record presents, any question in that regard. While it is true that the non-use of a fusible plug is mentioned in the opinion the case turned on the question of defective and unsafe construction.

The locomotive boiler involved appears to have been equipped with button headed crown sheet bolts proper in a coal burning engine but improper and unsafe when oil was used for fuel. No change in this construction was made when a change in fuel from coal to oil was made.

Furthermore, so far as the question of a fusible plug was concerned the evidence of the plaintiff was to the effect that the water was not low, i. e., that the explosion was not due to low water. This was disputed and the jury having found for the plaintiff it is to be assumed that the failure of that particular boiler was not due to low water. Hence the question of use or non-use of a fusible plug was not only not involved as a matter of law but also not in the case as a matter of fact.

The case clearly distinguishes itself from the case at bar. The question which the jury in the *Donaldson* case had to determine was whether or not a particular form of construction was in fact unsafe. The Supreme Court held that this was an open question for the jury and that the failure of a boiler inspector to disapprove such construction was not conclusive on that point. This ruling is clearly not inconsistent with our views hereinbefore expressed as to the scope of the Boiler Inspection Act. We are not claiming that the failure of the Inspector, for example, to discover on inspection a defective condition of a particular engine would constitute a defense to the carrier when a boiler failure resulted from a defect which the inspector overlooked. Nor do

we claim that the failure by an inspector to disapprove the non-use of a fusible plug would be a defense in this case, and the Court will remember that in the *Donaldson* case the evidence failed to show an approval of the construction there employed. (p. 127)

Our contention goes deeper. It is, in substance, that when a locomotive boiler is in all other respects —

“in proper condition and safe to operate * * *”
and “may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb”

the non-use by the carrier of an appliance which might protect the engineer of the locomotive from the consequences of his negligent operation of an otherwise safe engine is not and may not be held to be a breach of duty under the Boiler Inspection Act, which does not require a fusible plug either expressly nor through regulations in force pursuant to the provisions of such act.

The question here involved is purely one of law—the non-use of a fusible plug in this boiler was admitted by the Company, which in addition to the fact that the Commission did not require fusible plugs showed that it was not used by various standard railroad systems, such as the New York Central, The Chicago, Burlington & Quincy, The Illinois Central, Baltimore and Ohio, The New York, Chicago and St. Louis (Nickel Plate). Likewise, it appears that The American Railway Master Mechanics Association, an association of motive power officials from nearly all the railroads of the country, have by resolution gone on record against the use of a fusible plug. (Record 51)

If the mere absence of a fusible plug from a locomotive boiler safe in all other respects is to be left to the jury for it to say that such constitutes a violation

of the Federal statute requiring locomotive boilers to be in proper condition and safe to operate, the jury will also be given the duty to ascertain whether the presence of such a safety device is a violation of the statute where injury results therefrom. Where an injury results from a fusible plug melting and shooting steam into the fire box of the locomotive, as is likely to occur (testimony of McGann, Record 20) the trial court would have to leave to the jury the question of whether the presence of such a plug was a violation of the Boiler Inspection Act. *A jury could very well hold that the installation of a plug was a violation of the statute since they apparently are not in general use and have been condemned by The American Railway Master Mechanics Association.* Thus, whether a Railroad Company installs or fails to install a fusible plug it is at the mercy of a jury which is permitted to find that either its presence or absence is a violation of the Federal statute which imposes an absolute liability on the company in case injury results from a breach thereof. Obviously it was the design of Congress that the statute should be given a consistent application by rules promulgated by the Interstate Commerce Commission and not that juries should place varying and inconsistent interpretations thereupon, making carriers liable regardless of whether they installed or failed to install some particular safety device not specifically required by the statute.

II. The trial court left to the jury for its determination the question whether the crown sheet of the boiler which exploded was dangerous and defective, using the following language:

“(1) Did the defendant permit or allow a dangerous, unsafe and insufficient condition to be and arise in and about the crown sheet of said boiler

whereby it was weakened and became defective, unsafe and leaky; whether that was due to any or whatever cause, broken crown or stay-bolts or other causes, and if so, was the boiler explosion thereby caused in whole or in part. Plaintiff asserts that, and the defendant denies it. It will be for you to say under the evidence here, gentlemen, and the law as I state it to you, what the fact is in this respect.

* * * The question, then, will be whether or not the defendant used this locomotive engine when it was not in proper condition and safe to operate in the service to which it was put so that the same might be employed in the active service of such carrier without unnecessary peril to life or limb. The standard of duty is that they shall put it in proper condition and keep it in proper condition and safe to operate; it is required that it should be put in a condition and kept in a condition so that it might be employed in the service without unnecessary peril to life or limb. This is an absolute duty. If the engine, as to the crown sheet was, in fact, permitted to be or to become in a defective, dangerous, or unsafe condition, in such a condition that it was not safe to operate in service, or in such a condition that it could not be employed in the active service of the carrier in moving traffic without unnecessary peril to life or limb, that would be a violation of its duties; and if, as a result of such violation of its duties, the explosion occurred, or such failure was a contributing cause, or a direct and proximate cause, along with others, to the explosion and the resultant injury, the defendant would be liable."

The defendant asserts that there was no evidence warranting the court in submitting to the jury any question as to the unsafe and defective condition of the boiler or the crown sheet therein, and that such action was erroneous and prejudicial.

The record in this case contains practically a complete history of this engine so far as its condition and matters of inspection are concerned, from June, 1920, until September 3, 1920, at which time the engine was turned over to Groeger for the trip on which the explosion occurred. For example, on June 5, 1920, engine No. 2541 was given a general overhauling and repair, as shown by defendant's Exhibit No. 12 (Record 94 to 96). The character of this overhauling is evident from the subject-matter of defendant's Exhibit 12 and is described by witness McGann (Record 67 and 68). In addition to this semi-annual overhauling and report thereof, the Interstate Commerce Commission regulations require a monthly locomotive inspection and repair report. This was done on August 11, 1920, about three weeks prior to the accident, as shown by defendant's Exhibit 6 (Record 89). The character of this inspection and repair is shown by that exhibit and is also described by witness Cecil (Record 52) and witness Dixon (Record 57). This latter witness also describes the process of washing a boiler (Record 58 and 59). In railroad language, the process of inspecting and repairing an engine called for by the monthly inspection report (Defendant's Exhibit 6, Rec. 89) is known as "forming" an engine (Record 57), and is also further described by witness Hooper (Record 57).

It also appears that the boiler of this engine was washed on August 5, August 21 and August 30 (Record 57 and 58). In connection with these reports, the various witnesses who took part in the inspection and repairs made and thus reported, testified as to what was done (Testimony of Cecil, Record 52; Brewer, Record 53; Kennedy, Record 55; Hooper, Record 56; Dixon, Record 57). In addition to these employes, two engi-

neers of the Company, who operated this engine immediately prior to Groeger's trip, testified regarding the condition of the engine. For example, Howard Lisle (Record 60) testified that he as an engineer operated this engine on the 29th, 30th and 31st, and that

"while I was operating the engine on the 29th, 30th and 31st of August, I did not have a bit of trouble with the injectors. The gauge cock was O. K. and the water glass. You can check the water glass against the gauge cocks and the gauge cocks against the water glass. They correctly show the height of the water."

T. E. Peele (Record 60) says:

"I had it (engine No. 2541) out of Holloway on the 31st of August * * *. I was hauling a freight train * * *. When I had that train on the 31st of August the condition of her gauge cocks was good and her injectors were good. I did not have any trouble or notice any defect in the water glass. Her steaming qualities, as far as being an efficient engine is concerned, were good."

J. W. Hamilton, engineer (Record 54) had the engine on the day preceding the explosion, and testifies that he made out a work report, (Defendant's Exhibit 8, Record 92) at the conclusion of his run, calling attention to what trouble had developed during the run which ended at 1:30 p. m. on September 2. After describing the engine, Hamilton testifies:

"When I operated that locomotive she was a good locomotive, one of the best we had."

With respect to water conditions, W. J. Dixon, a witness on behalf of plaintiff, testified that the water conditions at Holloway, Fairport, Bridgeport and Benwood were good (Record 13).

The foregoing testimony, which is not disputed, constitutes, with the exceptions hereinafter referred to, the proof respecting the condition of this engine and these appliances when it was turned over to Groeger prior to his trip.

The exception above referred to is with regard to certain stay-bolts which were found after the explosion to have been broken, and which, according to the evidence, were broken prior to the accident (Record 19). The Court will find a rather complete description of the engine, including the boiler, in the testimony of Walter C. Hedeman (Record 42, *et seq.*), in which the witness describes in general the construction of the boiler. The crown sheet, wrapper sheet and the flue sheets are held and fastened together (and also kept apart) by stay-bolts, there being 1464 stay-bolts in each engine. The testimony of Joseph A. Boyden (Record 29 and 30) is explanatory of the detail of locomotive boiler construction.

With respect to these stay-bolts, it appears from the record that under the regulations of the Interstate Commerce Commission no engine may be used where it has more than five broken bolts, or where it has two broken bolts which are adjacent to each other (Record 30, 49 and 77). In this case there were six intermediate stays, two of which were adjacent, and one stay-bolt at the forward part of the crown sheet, broken. The location of these broken bolts is described on pages 18 and 19 of the record, and are located by witness Hedeman (Record 46).

There is in this record, however, not a scintilla of evidence to the effect that the broken bolts (which appeared from their condition to have been broken prior to the accident) had any connection whatever with this

explosion. Expert witnesses for plaintiff and defendant agree in this conclusion. For example, Charles McGann testifying on behalf of both plaintiff and defendant says (Record 22):

"These stay-bolts had no contributing cause toward the failure whatever."

and in the Record, page 66, further says:

"In my opinion those broken bolts contributed none whatever to the tear of the crown sheet and the consequent explosion of the boiler."

The opinion of John A. Boyden is indicated by the following question and answer (Record 30):

"Q. Now, supposing after a tear or boiler explosion, the tear in the crown sheet was located by those who inspected the engine after the explosion, and suppose that that tear was not adjacent, nor did it come inward near the bolt or two bolts that were broken, but that the tear pulled out good bolts, pulled off the good bolts, you would have some difficulty, would you not, in coming to the conclusion that these other broken bolts were a contributing factor to that boiler failure? A. I would."

Charles A. Karnell, an expert from the New York Central Railroad Company, testified (Record 41):

"The three stay-bolts as they are marked as broken there on each side, were not a contributing factor to the explosion, due to the fact that the solid stays had to let go first before they could come to this."

Walter C. Hedeman (Record 47) testifies as follows:

"Q. Now, Mr. Hedeman, having that in mind and having in mind the location of those seven bolts, in your opinion as a boiler expert, could those

seven bolts be considered as even a contributing cause to that boiler failure?

A. Absolutely not."

In other words, as one witness put it,

"From the appearance of the crown sheet, the boiler would have exploded if these broken stay-bolts discovered thereafter, had been intact prior to the explosion." (Record 22).

In addition to the testimony of these men, (and it will be recalled that McGann had the opportunity of examining the bolts and engine shortly after the explosion) the circumstantial evidence with regard to the point where the boiler failure started absolutely excludes any theory or idea that these broken bolts contributed in any way to this explosion. For example, McGann, making an examination within three hours after the explosion occurred, found on the crown sheet the pea-cock blue coloring, which in itself is conclusive evidence of the over-heating of the crown sheet in the area thus colored (Record 65).

Joseph A. Boyden, witness for the plaintiff, also testifies that a blue area on the crown sheet indicates that the crown sheet has become exposed due to low water. The testimony of Karnell (Record 41), and Hedeman (Record 46), is to the same effect. The testimony of Hedeman (Record 46) and McGann (Record 65 *et seq.*) shows that the cause of the explosion was the low water and that the place of the tear and the condition of the bolts from which the crown sheet was separated by the force of the explosion and the relation of such bolts to the six broken stay-bolts conclusively establish that these broken bolts could not possibly have been involved in this boiler explosion.

We therefore submit that upon this record there is no more basis for the claim that these stay-bolts contributed to this boiler failure than, we submit, that a broken bell clapper on the engine (if such were the fact) could be proximately involved in an explosion of the locomotive boiler.

The error of the Court below in this regard is evidenced by its charge to the jury hereinbefore quoted. We desire to point out that the error of the Court in submitting to the jury a question in support of which there is no evidence in the record was emphasized by the fact that not only did the Court submit this question of broken stay-bolts to the jury, but in connection with that submitted to the jury the question of whether or not the crown sheet of said boiler was "weak, defective, unsafe and leaky * * * due to having previously been overheated." There is absolutely no evidence in the record that this crown sheet had been previously overheated.

We desire to suggest in this connection that the only testimony regarding any defective condition related solely to these stay-bolts and submit that aside from our position that there is no evidence to support the claim that the broken stay-bolts had any causal connection with the explosion, the necessary effect of the Court's instructions in regard to the condition of the engine was to connect with the matter of broken stay-bolts the claim of the plaintiff in regard to want of inspection and previous overheating of the crown sheet to support which no evidence was attempted to be introduced by the plaintiff.

III. The third assignment of error by the defendant raises a question of the interpretation of the Boiler

Inspection Act, namely, whether under the Boiler Inspection Act carriers are required to avail themselves of the best mechanical contrivances and inventions in known practical use which are or would be effective in making a locomotive boiler safe as against explosions.

The trial court charged that such was the defendant's duty, using the following language:

"An interstate carrier, as well as any railroad carriers, owes the duty, of course, of availing itself of the best mechanical contrivances and inventions in known practical use which are or would be effective in making safe a locomotive boiler as against explosions. It is not bound to introduce a new appliance the moment somebody suggests it or discovers it, but is entitled to a reasonable time and opportunity to test it out and make any changes.

"Such I conceive to be the rules under which you are here to determine whether or not the standard of duty in making this engine safe did or did not require installation of a fusible plug. I say to you it is and was the duty of the defendant to avail itself of the best mechanical contrivances and inventions in known practical use which were or are effective in making the boilers safe as against explosions. * * * If you shall find, under the charge that I have given you, that a fusible safety plug was required by that standard, and that it was a mechanical means and contrivance in known practical use and effective more than was any other that had been installed by the defendant on this engine, then its absence would be a violation of the Boiler Inspection Act, and if the explosion resulted in whole or in part because of the absence of the fusible plug, and the decedent thereby met his death, plaintiff would be entitled to recover."

The defendant asserts that it is not bound to install the best mechanical devices to insure the safety of the

boilers of its locomotives and that the Court erroneously made the standard of its duty dependent upon the practice of other carriers which is not the standard imposed by the statute.

The Boiler Inspection Act in Section 2 prohibits the use of locomotive engines unless the boilers thereof "are in proper condition and safe to operate in the service to which the same are put." The statute thus defines and establishes the standard of the defendant's duty. The common law rule in force prior to the adoption of such statute required a common carrier to use ordinary care in providing and maintaining equipment reasonably safe and suitable for the use of its employes. Congress by the Boiler Inspection Act obviously designed only to make such duty absolute rather than qualified as being based on negligence. The evident legislative purpose was to impose liability on carriers if injury resulted from their failure to furnish locomotive boilers which were reasonably safe regardless of whether they were negligent in doing so or not. The duty imposed by the common law upon railroad companies is now absolute instead of being based on negligence but the character of the appliances they are required to furnish remains the same, that is, reasonably safe and suitable for the use of their employes. The failure to furnish a locomotive with a reasonably safe boiler is negligence *per se* but the statute does not require that the boiler furnished be of any different character than was required at common law.

That Congress by the adoption of the Safety Appliance Act and the Boiler Inspection Act merely changed the duty from a qualified one based upon negligence to an absolute one is evidenced by several decisions of this Court.

In *San Antonio Ry. vs. Wagner*, 241 U. S. 476, 484, this Court stated with reference to the Safety Appliance Act:

"If this Act is violated, the question of negligence in the general sense of want of care is immaterial. 241 U. S. 43, and cases there cited. But the two statutes are *in pari materia*, and where the Employers' Liability Act refers to 'any defect or insufficiency, *due to its negligence*, in its cars, engines, appliances,' etc., it clearly is the legislative intent to treat a violation of the Safety Appliance Act as 'negligence'—what is sometimes called negligence *per se*."

The court in *Louisville & Nashville R. R. vs. Layton*, 243 U. S. 620, stated with reference to the same statute:

"By this legislation the qualified duty of the common law is expanded into an absolute duty with respect to car couplers and if the defendant railroad companies used cars which did not comply with the standard thus prescribed they violated the plain prohibition of the law, and there arose from that violation a liability to make compensation to any employee who was injured because of it."

In *St. Louis, I. M. & S. Ry. Co. vs. Taylor*, 210 U. S. 281, the court held:

"In the case before us the liability of the defendant does not grow out of the common law duty of master to servant. The Congress, *not satisfied with the common law duty and its resulting liability*, has prescribed and defined the *duty by statute*. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There

is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was *to supplant the qualified duty of the common law with an absolute duty deemed by it more just.*"

The above language was quoted with approval in *C. P. & Q. Ry. vs. U. S.*, 220 U. S. 556.

It thus appears that the only change made by the Boiler Inspection Act is in the abrogation of the requirement of negligence as a condition of the defendant's liability. The duty of the carrier is now absolute but the character of the equipment it is required to furnish is the same and if under the common law and the Federal Employers' Liability Act there was no requirement that a carrier avail itself of the best mechanical contrivances and inventions in known practical use, there is no such requirement now and the charge of the court was erroneous and prejudicial.

That there was no such requirement existing under the common law or the Federal Employers' Liability Act is clearly disclosed by the language of this Court in *Chicago & Northwestern R. R. vs. Bower*, 241 U. S. 470, 473. There action was brought under the Federal Employers' Liability Act, it being asserted that the defendant supplied the plaintiff with a locomotive containing certain defective appliances. The court stated:

"The rule of law is: That the employer is under a duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the employee, *but is not required to furnish the latest, best, and safest appliances, or to discard standard appliances upon the discovery of later improvements, provided those in use are reasonably safe and suitable. Washington, Etc.*

R. R. vs. McDade, 135 U. S. 554, 570; *Patton vs. Tex. & Pac. Ry.*, 179 U. S. 658, 664." (Italics ours)

In *Washington R. R. vs. McDade*, 135 U. S. 554, 570, it was held:

"The general principles of law by which the liability of an employer for injuries to an employe, growing out of defective machinery, is tested are well settled by those decisions. Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employes. *Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed.* They are however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter." (Italics ours).

To require a carrier to avail itself of the best mechanical devices in known practical use is to measure its duty by the practice of other carriers and not by the standard established by law. The equipment of other carriers may go beyond a compliance with the duty imposed upon the defendant or it may fall short of compliance therewith. The law requires locomotive boilers reasonably safe and in proper condition. That is the standard and although the practice of other carriers may be evidence of a compliance or a failure of compliance therewith the standard is not defined or established by such practice. If the equipment used by a carrier is reasonably safe and proper it has discharged its duty and the fact that other carriers employ other equipment which to some juries might seem more safe than that used by the defendant, is immaterial.

Obviously the practice of other carriers is evidence alone of the compliance or failure of compliance by the defendant with its duty but it does not define or fix the standard of such duty.

As stated in *Wigmore on Evidence*, Sections 459 to 461:

“Another objection that may occur is that the conduct of another person is not to be taken as a *standard determining legal duty*. This is undoubtedly true; but it is easy to distinguish between the conduct of another person as a standard of duty and the same conduct merely as evidence of the nature of the thing which is the subject of the duty. * * * The distinction is itself a simple one. (1) The conduct of others evidences the tendency of the thing in question; and such conduct—e.g. in using brakes on a hill, felt shoes in a powder factory, railings around a machine, or in not using them—is receivable with other evidence showing the tendency of the thing as dangerous, defective, or the reverse. But this is only evidence. The jury may find from other evidence that the thing was in fact dangerous, defective, or the reverse, and that its maintenance was or was not negligence, in spite of the above evidence. (2) Meanwhile, the substantive law tells them what the standard of conduct for negligence is; and this standard is a fixed one, independent of the actual conduct of others. To take that conduct as furnishing a sufficient legal standard of negligence would be to abandon the standard set by the substantive law, and would be improper. This conduct of others, then, (1) is receivable as some evidence of the nature of the thing in question, because it indicates what is the influence of the thing on the ordinary person in that situation; but (2) it is not to be taken as

fixing a legal standard for the conduct required by law."

In *Texas & Pac. R. R. vs. Behymer*, 189 U. S. 469, this Court held that whether the defendant railroad company operated a train in the usual and ordinary way was not the criterion of its liability for resulting injury, saying:

"What usually is done may be evidence of what ought to be done but what ought to be done is fixed by a standard of reasonable prudence. whether it usually is complied with or not."

Wabash R. R. Co. vs. MacDaniels, 157 U. S. 454;
Shandrew vs. Chic., Mil. & St. Paul R. R., 142
 Fed. 320;

Midland Valley R. R. vs. Bell, 242 Fed. 803.

Similarly in this case what equipment the defendant ought to have furnished is fixed by the standard established by law and what equipment other carriers furnish is, if anything, evidence alone of compliance or failure of compliance with such standard and the practice of other carriers does not establish the standard of defendant's duty. By statute the defendant is required to supply locomotives "in proper condition and safe to operate." Such is apparently defined by the pre-existing common law rule as requiring merely reasonably safe equipment and appliances. Clearly under the decisions above noted defendant was not required to furnish the best and safest equipment known nor was it required to adopt and use the best equipment in known practical use. The practice of other carriers is material only as evidence and the court erred in charging the jury that the defendant was required to furnish the best equipment in known practical use to insure its boilers as against explosions.

CONCLUSION.

We, therefore, submit that the questions here raised by the defendant are of great importance because they concern the interpretation of statutes of the United States upon questions relative to which there is no clear or established authority and that the defendant's petition for a writ of certiorari should be granted and the judgment below reversed and a new trial had.

Respectfully submitted,

S. H. TOLLES,

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J. P. WOOD,

J. W. REAVIS,

Of Counsel.



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No.

In the Supreme Court of the United States

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

VS.

FREDA GROEGER, Administratrix of the Estate of John C.
Groeger, Deceased,
Respondent.

**BRIEF ON BEHALF OF THE BALTIMORE
AND OHIO RAILROAD COMPANY.**

S. H. TOLLES,
Counsel for Petitioner.

W. T. KINDER,
J. P. WOOD,
J. W. REAVIS,
Of Counsel.

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No.

In the Supreme Court of the United States

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Petitioner,

vs.

FREDA GROEGER, Administratrix of the Estate of John C.
Groeger, Deceased,

Respondent.

BRIEF ON BEHALF OF THE BALTIMORE AND OHIO RAILROAD COMPANY.

STATEMENT OF CASE.

This case is here on a writ of certiorari to the United States Court of Appeals for the Sixth Circuit granted on the petition of The Baltimore and Ohio Railroad Company seeking a review of the judgment of the Court of Appeals affirming a judgment in favor of the respondent against petitioner rendered in the United States District Court for the Northern District of Ohio where respondent instituted an action seeking the recovery of money damages for the alleged wrongful death of John C. Groeger while in the employ of the Company as a locomotive engineer.

For the purpose of convenience, the parties will be referred to as they stood in the trial court, to-wit, Freda Groeger, Administratrix of the Estate of John C. Groeger, Deceased, Plaintiff, vs. The Baltimore and Ohio Railroad Company, Defendant.

This action was brought under the Federal Liability Act of April 22, 1908, and its amendments, it being claimed by plaintiff and admitted by defendant that the parties were engaged in interstate commerce at the time of the accident. The plaintiff also relied on the Federal Boiler Inspection Act, 36 Stat. L. 913, 8 U. S. Comp. Stat. §8631, and its amendments, 38 Stat. L. 1192, 8 U. S. Comp. Stat. §8639-a, claiming a right of recovery upon an asserted breach by defendant of a duty said to be imposed by said statute. This was and is denied by defendant.

The case is as follows:

On the morning of September 3, 1920, John C. Groeger, an engineer employed by the defendant and in charge of Engine No. 2541, left Holloway, Ohio, with a freight train for Brooklyn Junction, West Virginia, crossing the Ohio River at Wheeling and proceeding by way of Moundsville, Chestnut Hill, Foster's Tower and Proctor. At or near Proctor, West Virginia, some three miles beyond Foster's Tower, the boiler of the engine exploded, resulting in the death of Groeger, the engineer, the fireman and the head brakeman who constituted the engine crew at the time of the explosion.

Within two hours after the explosion a thorough examination of the locomotive was made (Rec. 50). This disclosed among other things that the crown sheet was

"overheated in an area of forty-six or forty-eight by thirty-four inches in diameter covering the highest part of the crown sheet which was discolored and showed a very peacock blue coloring, indicating that the crown sheet had been overheated." (Rec. 50).

The extent of the tear in the crown sheet and the location thereof and of the stay-bolts from which the sheet had been pulled is further described by the witness

McGann (Rec. 50) and has been plotted to scale on defendant's Exhibit 1 (Rec. 35), a model which will be presented on oral argument. Overheating of the crown sheet with this consequent "peacock-blue" marking, indicating the height of the water on the steel at the time of the explosion (Rec. 21) denotes in the opinion of witnesses for both sides "low water" in the boiler. (See testimony of Plaintiff's expert, Boyden, Rec. 21). It was and is the claim of the defendant that Groeger was solely to blame for this "low water" and the consequent explosion.

It also appeared that the examination by McGann developed that prior to the explosion there were seven broken stay-bolts in the entire boiler but

"The bolts which we found were not near the sheet that had tore either on the right or left side." (Rec. 50).

but neither in the opinion of Master Mechanic McGann, Hedeman (Rec. 35), Karnell (Rec. 31) testifying as experts on behalf of defendant, nor of Boyden (Rec. 22) testifying for the plaintiff, were these broken bolts a contributing factor in this accident.

Finally it appears from the testimony of other engineers who had operated the engine on August 29th and 30th (Lisle, Rec. 46), on August 31st (Peal, Rec. 45) and on September 2nd (Hamilton, Rec. 41) that the engine involved, including any of its appliances here involved, was in good condition. Hamilton (Rec. 41) who operated this engine on September 2nd, the day prior to the explosion, sums up the condition of the engine as follows:

"When I operated that locomotive she was a good locomotive, one of the best we had."

The various reports required by law (Defendant's Exhibits 6, 7, 8, 9 and 12—Rec. 63 to 69) disclose the maintenance record of this engine and its condition up to the day preceding the accident.

With respect to the actual performance of the engine on the morning of the explosion the evidence is limited by reason of the fact that the fireman and head brakeman were also killed in the explosion. The conductor, Bethel, (Rec. 9 to 12) in the caboose at the time of the explosion, was the only witness who was with the train from the start of the trip until the accident. One other witness, Bursee, testifying by deposition, claimed to have been on the engine for a few minutes at Foster's Tower some three miles from the scene of the explosion. We refer to Bursee's testimony in view of the fact that the opinion of the Court below discloses that the Court of Appeals gave to this testimony a weight and emphasis to which, as the cross-examination of this witness and the testimony of other witnesses clearly discloses, it was not entitled. We will analyze this testimony later.

Conductor Bethel, in brief, testifies that the train started at Holloway, Ohio, about daybreak and proceeded through Bridgeport, Ohio, to McMechen, West Virginia. From McMechen to Moundsville, Bethel noticed the slack "running up into the train from the rear" (Rec. 10), which indicated to Bethel that the engineer had shut off, but the train kept moving and did not stop before reaching Moundsville. At Chestnut Hill, beyond Moundsville, the train went in on a siding and Bethel was advised that the "link hanger" was broken. This link hanger has no connection with the boiler or water conditions therein. It is, as one witness put it, "the reversing mechanism on the engine, and is located down around the wheels between

the drivers underneath the engine. It is a mechanism like the gear of an automobile; if that was out of order you couldn't go into reverse." (Brookover, Rec. 48).

From Chestnut Hill to Foster's Tower, a distance of six miles, Bethel rode the engine in order to sign a 31 order (an order that a conductor signs, Rec. 47) during which interval Bethel remembers that there was one injector working. He saw a gauge cock test made; this showed blue steam, indicating lack of water (Rec. 11); and the water went up and down in the water glass. Bethel got off the engine at Foster's Tower and was in the caboose when the explosion occurred at Proctor, two and a half or three miles beyond Foster's Tower. The evident import of the testimony of Bethel, called as plaintiff's witness, is that between Chestnut Hill and Foster the water was low in the boiler of Groeger's engine. He testified under examination by the Court that the gauge cock test showing blue steam was made by the fireman on the engineer's side of the engine (Rec. 12). It will also be noted that the engine took water, i. e., into the tender, at Foster's Tower (Rec. 12, 47, 48).

Burse's testimony given by deposition (Rec. 23-29, incl.) is entitled on its face to little if any weight. We refer to it, however, to complete the detail of the facts. His asserted presence on Groeger's engine (although a member of a crew of another train) while taking water at Foster's Tower is denied by Brookover, the engineer of the other (Burse's) train (Rec. 47) and negatived by Hill, Burse's conductor, (Rec. 48 and 49).

Aside from the obvious improbability of a head brakeman on another train on an adjoining track busying himself about a locomotive, making a detailed inspection thereof and conversing with the engineer when he ad-

mittedly had no duty to perform thereon (Rec. 26) Bursee's cross-examination discloses such further inconsistencies as to warrant the conclusion that his evidence is without value. In fact his testimony, which supports no specific or assigned claim of negligence in the amended petition was passed without comment in the charge of the Court which, as before indicated, in effect limits plaintiff's case to the two propositions involving (1) the broken stay-bolts, and (2) the question of the fusible plug.

For example, Bursee testifies that Groeger in taking water had unhooked his engine from his train. This is untrue as by reason of the broken link hanger Groeger could not reverse his engine and, therefore, had to "spot" his engine (with train attached) at the water plug (Brookover, Rec. 48). Bursee further testifies that he was on the engine three to five minutes and that both injectors were on. (Rec. 26). This is untrue as with both injectors on and having a capacity of nine thousand gallons per hour this amount of water would so reduce the steam pressure that the engine could not move the train (Rec. 51).

The record also shows that the blower was on (Rec. 48), hence escaping steam from any cause would, with the throttle closed as it was at Foster's Tower, be drawn out through the smoke box into the atmosphere (Rec. 51). Further, at Moundsville the trouble with the link hanger developed as related by the conductor (Rec. 10); and if Bursee had any talk with Groeger (Rec. 27) the latter undoubtedly referred to that. It is significant that he does not say that Groeger said anything about water conditions.

The fact, however, which conclusively shows Bursee's testimony to be without any weight is that at no time after

the explosion (although he was a member of the work crew immediately despatched to the scene, (Rec. 24) did Bursee report his alleged examination of the engine to "anybody at all at any time." (Rec. 27). The accident occurred September 3, 1920. His deposition was taken January 4, 1922, and Bursee admittedly never mentioned his story to any one until a month prior to his deposition which disclosed a recent claim of his against the Pennsylvania Railroad Company, in respect of which he was represented by counsel for plaintiff.

Before a discussion of the legal questions involved and by reason of the fact that the complaints of the plaintiff respecting this locomotive are, as hereinafter shown, confined in the record to the boiler thereof and more immediately to the crown sheet and its supporting bolts, it may be helpful to here place before the Court such facts from the record as will assist in the vizualization of the locomotive and the part or parts in question. In this regard, in addition to the photographic exhibits attached to the record at page 62 showing a locomotive fire box, including crown and wrapper sheet, brick arch, flues, etc., (Defendant's Exhibit 2), the interior of the engine cab showing the gauge cocks, water glass and injectors (Defendant's Exhibit No. 3), there will be presented at the oral argument a model of crown and wrapper sheet which will facilitate the definition and location of the various appliances and a description of their use and function.

The crown and side sheet of a locomotive is a circular sheet of three-eighths inch steel of one piece (Rec. 32, 33, 34) and is located immediately over the fire box and as shown by defendant's Exhibit 2 (Rec. 62) it is the under surface of this crown sheet that the flames strike after passing around the brick arch. At the front of the fire

box and attached to the crown sheet is the flue sheet to which are attached the flues or pipe (282 in number) which carry the gas, flame and smoke to the front end of the locomotive and out the smoke stack (Rec. 33). The space provided for the water from which is generated the steam is the space between the crown sheet and wrapper sheet and around the flues.

These various sheets so built together as to afford the space for the water are so fixed and held by stay-bolts, 1464 in number, and are variously known as crown, radial and intermediate bolts, depending on their location. The testimony of W. C. Hedeman (Rec. 32 to 35) is in part devoted to a clear description of the boiler construction of this engine.

The water carried in the tank or tender attached to the locomotive is transferred to the boiler by means of two injectors known as the left and right injector, one being located on the right side and the other on the left side of the engine cab. They appear, although not plainly marked, in Defendant's Exhibit 3 (Folio 85 after page 6 of the Record). These injectors may be "likened to a water faucet"; "it depends on how far it is turned on as to how much water is going into your boiler." These are in the control of the engineer and each has the capacity of supplying 4500 gallons per hour to the boiler (Rec. 15, 51).

In the engine cab in view and reach of the engineer are located appliances by means of which the engineer can at all times determine the height of the water in the engine boiler. One of these appliances is a water glass, also called a water bottle. The other consists of three gauge cocks.

"The gauge cocks are located in different altitudes within easy reach of the engineer and by turn-

ing the gauge cock he can determine that he has water as high as that gauge cock and the second and third gauge cocks the same way. It is about eleven inches from the top of the crown sheet to the top reading of the top gauge cock. In other words * * * if a man has three gauges of water he has eleven inches over his crown sheet (Rec. 19)."

"The water glass is not a round glass cylinder any more, it is flat, more for protection and safety. The height of the water stands in the glass." (Rec. 20).

"You can check the water glass against the gauge cocks and the gauge cocks against the water glass." (Rec. 46).

The water glass and gauge cocks are shown in Defendant's Exhibit 3 (Folio 85 near page 62 of Record).

The principal ground of recovery relied on by the plaintiff was the fact that the engine involved did not have installed in the crown sheet of the locomotive boiler a fusible plug, which is a brass plug "with a square on the bottom of it and drilled out either five or six small holes or one large hole and filled with babbitt metal or pewter of some soft substance." (Rec. 14). It is inserted just above the crown-sheet and "acts as a supplemental safety valve * * * so that when the water gets low in the boiler the intense heat will allow this metal to become softened and run out * * * and water escapes and drowns out the fire."

It was conceded by the defendant that no such plug was used on this engine or on any other engine used on the Baltimore and Ohio system.

The claims of negligence set forth in the plaintiff's amended petition (Rec. 80) were substantially as follows:

"First. In permitting a dangerous condition to exist in said engine, in that the crown sheet of the

boiler was defective by reason of being overheated prior to the explosion.

"Second. In equipping said engine with a defective water glass indicator, in that it did not indicate the real height of the water in the boiler.

"Third. In failing to furnish Groeger with a reasonably safe place in which to work.

"Fourth. In failing to make adequate and sufficient inspection of the engine and its equipment.

"Fifth. In failing to equip said boiler with a fusible plug.

"Sixth. In permitting the use of unfit and improper water in the engine, in that said water contained foreign matter, causing foam and resultant incorrect indication in the gauge cock of the height of the water in the boiler."

The trial court took from the jury as being unsupported by any evidence the second assignment of negligence regarding the water glass indicator and the sixth assignment of negligence that improper water was used (Rec. 55) and consolidating the first, third, fourth and fifth assignments of negligence limited plaintiff's case to the jury to two claims of negligence, as follows: (Rec. 55, 56)

"(1) Did the defendant permit or allow a dangerous, unsafe and insufficient condition to be and arise in and about the crown sheet of said boiler whereby it was weakened and became defective, unsafe and leaky; whether that was due to any or whatever cause, broken crown or stay-bolts or other causes, and if so, was the boiler explosion thereby caused in whole or in part. Plaintiff asserts that, and the defendant denies it. It will be for you to say under the evidence here, gentlemen, and the law as I state it to you, what the fact is in this respect.

Not Required
Required to be removed
Some say Boiler stay bolts -

“(2) It being conceded that the defendant had failed to install and equip this locomotive engine with a fusible safety plug, it will be for you to say whether or not the standard of duty imposed by law upon the defendant, to see that any locomotive engine propelled by steam in use upon its road in interstate commerce was in a proper condition and safe to operate in the service to which it was put, that the same might be employed in the active service of moving traffic without unnecessary peril to life or limb, was violated by the failure to equip this engine with a fusible safety plug.”

The Court also charged the jury—(Rec. 57 and 58)

“An interstate carrier, as well as any railroad carriers, owes the duty, of course, of availing itself of the best mechanical contrivances and inventions in known practical use which are or would be effective in making safe a locomotive boiler as against explosions. It is not bound to introduce a new appliance the moment somebody suggests it or discovers it, but is entitled to a reasonable time and opportunity to test it out and make any changes.

“Such I conceive to be the rules under which you are here to determine whether or not the standard of duty in making this engine safe did or did not require installation of a fusible plug. I say to you it is and was the duty of the defendant to avail itself of the best mechanical contrivances and inventions in known practical use which were or are effective in making the boilers safe as against explosions. * * *

“If you shall find, under the charge that I have given you, that a fusible safety plug was required by that standard, and that it was a mechanical means and contrivance in known practical use and effective more than was any other that had been installed by the defendant on this engine, then its absence would be a violation of the Boiler Inspection Act, and if the explosion resulted in whole or in part because of the

absence of the fusible plug, and the decedent thereby met his death, plaintiff would be entitled to recover."

The trial resulted in a verdict in the sum of \$10,576, upon which the trial court entered judgment in favor of the plaintiff in that amount (Rec. 5).

ARGUMENT.

On the facts thus presented we question the correctness of the judgment below on the following grounds:

A. The facts fail to disclose a breach by the defendant of any duty or obligation imposed upon it or defined for it by any enforceable requirement of law.

B. The trial court erred in leaving to the jury the question of the interpretation of the Federal Boiler Inspection Act, i. e., in permitting the jury to determine the standard of duty imposed by such statute and then determine whether under the facts the defendant had complied with the standard thus determined by the jury.

C. The Court erred in charging the jury that defendant was obligated to avail itself of the best mechanical contrivances and inventions in known practical use which are or might be effective in making the locomotive safe as against explosion.

D. The trial court erred in leaving to the jury the question of whether or not the crown sheet of the boiler was in a dangerous or defective condition—this for the reason that there was no evidence in support thereof.

The first three grounds relate in effect to and involve the question of the non-use by defendant of a fusible

plug, the last ground to the question of stay-bolts, and we proceed to their consideration in the order named, which is, it will be noted, in reverse of their order as submitted by the trial court to the jury:

A. We turn at once to the Boiler Inspection Act for the definition of the obligation asserted by plaintiff as the basis of liability. Section 2 thereof is as follows:

"From and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any common carrier, its officers or agents, subject to this act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic, *unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb,* and all boilers shall be inspected from time to time in accordance with the provisions of this act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

Does the section (1) contain an ascertainable standard of duty and (2) does this section, as construed by the trial court in its charge to the jury set up an obligation or requirement definite enough in terms to be susceptible of being enforced or complied with by the carrier?

We pass by as later discussed the question of the extent to which this act delegates to the Interstate Commerce Commission the duty to determine and enforce the standard said to be thus imposed and content ourselves with pointing out that in other sections (hereinafter quoted) the act requires that the boilers be able to withstand such tests as may be prescribed by regulations to be is-

sued by the Commission (Sec. 2). It also creates an organization of inspectors by and through whom the Commission approves or disapproves the carriers' rules for boiler inspection (Sec. 5). The inspectors are required to see to it that the carriers comply with these rules and repair such defects in the boilers and appurtenances as are thereby disclosed (Sec. 6) and further that when any boiler is found "*not conforming with the requirements of the law or the rules and regulations established* * * * such boiler shall not be used until put in serviceable condition." (Sec. 6)

Section 9 provides a penalty of \$100 for each and every violation of the act or rule or regulation made under its provision or lawful order of any inspector.

This act has not thus been questioned in any reported decision even on the basis urged without success against the Safety Appliance Act, so-called, relating to automatic couplers, grab-irons, etc., (*Southern Railway Co. vs. United States*, 222 U. S. 20) nor has it been before this Court but several times. *Vandalia Railroad vs. Public Service Commission*, 242 U. S., 255 (in which the act itself was not involved) and *Great Northern Railway vs. Donaldson*, 246 U. S., 121 (where the act was directly involved but the question herein was not made or presented by the record).

This Court has had occasion in many cases to declare whether or not the particular statute under attack provided an ascertainable standard of duty as required by the Fifth and Sixth Amendments to the Constitution. One of the most recent cases is *United States vs. Cohen Grocery Co.*, 255 U. S., 81.

It was here declared that Section 4 of the Food Control Act of 1917 as amended (also known as the Lever

Act), in penalizing any unjust or unreasonable rate or charge in handling or dealing with any necessities, forbade the exaction of an excessive price upon the sale of a commodity and, containing no ascertainable standard of guilt, was invalid under the requirements of the Fifth and Sixth Amendment. In the opinion of Chief Justice White reference is made to the various cases in which this Court had considered this question with reference to various statutes. Obviously the result in the *Cohen Grocery* case and the cases referred to in the opinion depended on the particular statute involved, the principle being clear, and we proceed at once to a discussion of the statute involved here.

Leaving aside the provisions of the act covering the function of the Interstate Commerce Commission and the system of inspection provided for, and assuming for the purpose of this discussion that the act consisted of Sections One, Two and Nine only, it will be observed that Section 2 contains the only measure of obligation provided. The locomotive boiler and appurtenances it is said shall be—

“in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carriers in moving traffic without unnecessary peril to life or limb.” ✓ ✓

While the requirement of a “proper condition and safe to operate” may be considered by construing the phrase “proper condition” and the word “safe” together and thus determining that it was intended to require a boiler to be absolutely safe and therefore without danger under every and all circumstances (like a secure handhold or grab-iron or automatic coupler required under the Safety Appliance Act), the further provision of Section

2 does not support this conclusion for the reason that the phrase above referred to is immediately followed by the qualifying provision, to-wit:

“that the same may be employed in the active service of such carrier in moving traffic without *unnecessary* peril to life or limb.”

It is here, we submit, that the vice of the provision, as tested by the decision in *United States vs. Cohen Grocery, supra*, appears. So construed, the carrier is not prohibited from operating a locomotive in such condition that the boiler is *necessarily dangerous* to life and limb. The prohibition is against a boiler *unnecessarily dangerous*. Who, however, is to determine what is or what is not an unnecessary danger? This is not defined elsewhere in the act and in the building and construction of a locomotive boiler what guide or standard is provided the carrier by means of which it can determine an unnecessary danger and avoid the penalty of the statute?

The words “unnecessary danger” do not, it occurs to us, provide any more definite standard than the phrase “unjust or unreasonable rate” condemned by this Court in *United States vs. Cohen Grocery Co., supra*.

Is this provision “so explicit that all men subject to their penalties may know what acts it is their duty to avoid?” *United States vs. Brewer*, 139 U. S., 278, 288. The section “forbids no specific or definite act.” *United States vs. Cohen Grocery Co., supra*, p. 89.

The considerations here urged were suggested although not passed upon in *United States vs. Pennsylvania R. R. Co.*, 242 U. S. 208, 237, in connection with a requirement involving the phrase “*reasonable request and reasonable notice.*” See also *International Harvester Co. vs. Kentucky*, 234 U. S. 216; *Collins vs. Ken-*

tucky, 234 U. S. 634; *American Machine Co. vs. Kentucky*, 236 U. S. 660.

Thus construed, the provision does not meet the requirements of the rule in *Miller vs. Strahl*, 239 U. S. 426, and *Omaechevarria vs. Idaho*, 246 U. S. 343, in which specific acts were enjoined or prohibited.

Nor ought the principle that enactments of this character shall be liberally construed (*Louisville & Nashville R. R. Co. vs. Layton*, 243 U. S., 617) supply a non-existent rule of conduct.

Assuming, however, that it may be said that the provision of Section Two, in so far as the question of an ascertainable standard of conduct is concerned, must be construed in connection with the other sections of the act, to-wit, Three, Four, Five and Six, and that the rules and regulations of the Commission and inspectors furnish the standard of duty attempted to be defined by Section Two, it is clear that the record here does not disclose and it is not the fact that the Commission has, so far as any condition material to this case (except the matter of broken stay-bolts later discussed) is concerned, assumed to determine what is and what is not an unnecessarily dangerous condition in the locomotive boiler, but on the contrary the record affirmatively establishes that the Commission, for example, had not required, by any rule or regulation, the use of a fusible plug. (Rec. 57 where the Court so charged the jury.)

It, therefore, follows that so far as the question of a fusible plug was concerned, not only was there no evidence on which the plaintiff was entitled to go to the jury but also the court in its charge to the jury erroneously defined defendant's duty (Rec. 56 and 57), which was duly excepted to by defendant (Rec. 61) and assigned as error

(Rec. 70, 71 and 72). The Court's charge on the question of a fusible plug is as follows: (Rec. 56)

"Now, what is the law? As I have stated, these issues are controlled by provisions of the Boiler Inspection Act and by certain provisions of the Federal Employers Liability Act. The Boiler Inspection Act, among other things, provides that it shall be unlawful for any common carrier to use any locomotive engine propelled by steam power, moving in interstate or foreign traffic, unless the boiler of said locomotive engine and appurtenances thereof are in a proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb.

"Such was the duty of the defendant here, and it owed that duty to John Groeger, the deceased engineer, in the equipment of (fol. 74) and putting and keeping this engine in condition. The question, then, will be whether or not the defendant used this locomotive engine when it was not in proper condition and safe to operate in the service to which it was put so that the same might be employed in the active service of such carrier without unnecessary peril to life or limb. The standard of duty is that they shall put it in proper condition and keep it in proper condition and safe to operate; it is required that it should be put in a condition and kept in a condition so that it might be employed in the service without unnecessary peril to life or limb. This is an absolute duty."

The charge then proceeds (Rec. 57) as follows:

"Now, as to the failure to install a fusible plug, that depends upon different considerations. In other words, whether the standard of safety which is prescribed by that act requires a fusible plug depends upon somewhat different considerations, as to which it is my duty to charge you. If you shall say and find that the standard of duty imposed by the law required

a fusible safety plug to be installed, then the absence of the fusible safety plug would impose upon the defendant here an absolute liability, and the plaintiff would be entitled to recover if the absence of it contributed in whole or in part to cause the explosion and the resulting death. The law does not say that locomotive engines thus used shall have fusible plugs in them. The Interstate Commerce Commission has authority to prescribe regulations for inspections and for equipment under the Boiler (fol. 75) Inspection Act, and the Interstate Commerce Commission has not prescribed as a requirement that fusible safety plugs shall be installed on locomotive engines. It becomes, then, a question to be determined by you under the facts and circumstances of this case whether or not the duty to put locomotive boilers in proper condition so as to make them safe requires the installation of a fusible safety plug."

and later (Rec. 58):

"In determining that you will take into consideration all the facts and circumstances of the case, and the practice so far as it has been proven to you among railroad men, reasonably prudent and careful railroad operators, what they have done and what their judgment is in regard to the matter, and determine whether or not the fusible safety plug under the law as I have stated it to you was proper and necessary to put this engine in proper and safe condition to operate, and if the operation of it without such fusible safety plug created an unnecessary peril to the life and limb of the employees. If you shall find, under the charge that I have given you that a fusible safety plug was required by that standard, and that it was a mechanical means and contrivance in known practical use and effective more than was any other that had been installed by the defendant on this engine, then its absence would be a violation of the Boiler Inspection Act, and if the explosion resulted in whole or in part because of the absence of the

fusible plug, and the decedent thereby met his death, plaintiff would be entitled to recover.”

If the Boiler Inspection Act contains no ascertainable standard of duty or if in absence thereof the Interstate Commerce Commission was required to define such duty and proceeding to do so had not required a fusible plug, this charge is erroneous.

This brings us to our second proposition, to-wit, that irrespective of the question just considered—

B. The trial Court erred in leaving to the jury the question of the interpretation of the Boiler Inspection Act.

The above quoted part of the Court's charge when considered in connection with the evidence throws into clear relief the difficulty encountered in the construction of the Boiler Inspection Act adopted by the learned trial judge who was forced it will be noted to leave it to the jury (the Commission not having required a fusible plug) to determine the standard of duty imposed by the Act and then to determine whether the defendant had violated this standard. The record contains a detailed description of a fusible plug, its use, purpose, design, etc. For example, McGann says: (Rec. 14)

“I have seen a fusible plug in locomotives. Its purpose is to warn the engineer in case of his negligence in allowing the water to become low in the boiler; it tells him he has lost his water. If the engineer in charge of the boiler on line of road finds water getting low, getting below a safe point, he draws the fire. A fusible plug is a brass plug with a square on the bottom of it and drilled out, either five or six small holes, or one large hole, and filled with babbitt metal or pewter or some soft substance. The

crown sheet is tapped out at the forward part, the highest part of the crown sheet, and this plug screwed in, extending above the sheet about one-half or three-quarters of an inch, so that when the water gets low in the boiler, the intense heat will allow this metal to become softened and run out in the lower part of the fire-box, and some water escapes and drowns out his fire, and makes an awful noise in the fire-box, and then he knows his water is low and he takes the precaution to draw the fire to save further damage. It acts as a supplemental safety valve, but they are considered unsafe, due to the fact that this accumulation of scale gets on this metal plug and while the water is still over this plug, or is on top of the soft metal, it allows it to come out, run out in the fire-box, and oftentimes causes serious injury and serious burns. I never knew, in my experience, the blowing out of a fusible plug to blow up the boiler. It is not as serious when the fusible plug melts out and allows the escape of the steam, as when the boiler blows up. The fusible plug is placed from half to three-quarters of an inch above the top of the crown sheet. When the water gets below the highest part of the fusible plug and before it reaches the crown sheet, it exposes the top of the fusible plug with the soft metal in it, and the soft and fusible metal will melt out before the bolts of the crown sheet."

and Rec. 16:

"The objection to fusible plugs is they accumulate scale on top of the plug and this allows the metal to come out and causes the engine to fail and it is necessary to give up service on line or road. It oftentimes results in injuries to the crews; maybe the fireman is down putting in a fire, and if he should be firing there just at the time the metal comes out of the plug, that pressure in the boiler will blow the fire and hot cinders out of the fire door and it has proven very detrimental. The water and steam, when it comes out through the plug, comes down into the

fire-box at a pressure of 175 to 200 pounds per square inch, throwing the fire and hot coals out of the fire door. It has been determined to be unsafe, at least on the Baltimore & Ohio, I would say back as far as 1902 or 1903. Prior to that time, I think they were used; that was before my time, before 1906."

Boyden (Rec. 17) testifies:

"In railroad talk, a fusible plug is known as a soft plug. It is put into the highest point of the crown sheet, that is, the top of the inside of the fire-box. There is a soft metal applied to this brass plug so that if the water gets low this metal will melt. It is used as an alarm or a safety device to the engineer to know that his water is low in his boiler. When the fusible plug operates, it relieves the pressure between the fire-box sheet and the outside wrapper sheet, so that a boiler cannot blow up."

Karnell (Rec. 30) testifies:

"The fusible plug is not in use on the New York Central System because it is not practical. Due to the water surging back and fourth over locomotive crown sheets, we find that the tin in the fusible plug will fuse and melt, therefore permitting the water to get into the fire-box and putting out the fire. The movement of the locomotive in ordinary operation with plenty of water causes a movement of the water over the crown sheet back and fourth, so that on a grade, or for other reasons, a fusible plug is impractical because it is bared; that is to say, the water leaves it at times due to the ordinary operation of the engine. When a plug blows out it blows out through the fire-box, permitting the water and steam in the fire-chamber. If the fireman at that time happens to be putting fire into the fire door, he does not necessarily get the fire and steam; but it would tend to put the fire out. I wouldn't say as to injuries happening to the fireman."

and on page 31 says:

“As a rule, in the general railroading world, all the railroad systems, they are not used. They have not been accepted and used by master mechanics and locomotive engineers as standard equipment in locomotive service.”

Hedeman (Rec. 35 and 36) testifies:

“Fusible plugs are not used on the Baltimore & Ohio Railroad Company’s engines. We have approximately 2700 engines. The system extends to St. Louis, Chicago, Philadelphia, Baltimore, with numerous branch lines.

“I have made inquiries on the question of the use of soft plugs on locomotives other than the Baltimore & Ohio.

“Fusible plugs are regarded as an encouragement to the engineer to not keep careful watch on his water, not keep as careful watch on the water as he would if he didn’t have a fusible plug. In other words, he would rely to a certain extent on that fusible plug blowing out when the water got low, and if he wouldn’t have the fusible plug he would be very careful with his water and watch his gauge cocks and water glass. When the fusible plug blows out the water and steam come out at the front end of the crown sheet and it blows it down on the fire.”

“The B. & O. is the only railroad I am working for, I have not seen a fusible plug in use on the boiler of a locomotive engine. I know the purpose of it. Its purpose is when the plug would be exposed and not covered with water the soft metal would melt and come out and allow some water to escape. The plug won’t prevent the water from getting down to the top of this crown sheet; it would give warning.

“With a fusible plug in this boiler at the time of the explosion, all pressure within that boiler would not have been released by the action of that fusible

plug before the water could get low and leave the peacock blue mark on the top of the crown sheet. When the fusible plug metal melted it would blow steam and water down and give warning. Theoretically, it would release the pressure in that boiler, but it would be negligible through that small hole. The force of the steam going through the holes in that fusible plug would be as nothing compared with the blowing up of that boiler. When the fusible plug blows out it gives warning that the water is low. It is self-evident that the danger of a fusible plug blowing out is nothing compared to the danger of the boiler blowing up."

Ayers (Rec. 38) testifies:

"The fusible plug is not in use upon the locomotive boilers of the Nickel Plate Railroad. During the course of my connection, I have made a somewhat casual investigation, not particularly searching, into the extent of the use of fusible plugs on locomotive boilers. Without any definite figures to support my answer, it is my opinion that the use of the fusible plug in railroad work is not very general.

"The American Railway Master Mechanics Association is now a part of the American Railway Association as a mechanical section. Prior to that time it was an association of railway motive power officials, that is, the master mechanics or similar officials of the various railroads had an association, in which they met and discussed their problems, made reports and recommendations, and, in addition, adopted standard practices and designs. Those standard practices and designs were not compulsory but they represented the consensus of opinion as to what was the best practice. This American Railway Master Mechanics Association comprised representatives of nearly all the railroads in the country.

"According to the proceedings of the American Railway Master Mechanics Association, they passed

a resolution in 1899. Defendant's Exhibit 5 is a copy of the resolution as it appears in the 1917 and '18 proceedings of the American Railway Master Mechanics Association. It was adopted in 1899, and those things are carried forward from year to year in the proceedings. That was copied correctly directly from a printed copy of the proceedings, and reads as follows:

'Resolved that it is the sense of the American Railway Master Mechanics Association that the use of fusible plugs in the crown sheets of locomotive fire-boxes is not conducive to the prevention of the overheating of the crown sheet.' "

We submit that under these circumstances the non-use of a fusible plug should not have been submitted to the jury under Section 2 of the Boiler Inspection Act already quoted. Even if this duty thus attempted to be defined reaches the dignity of a specific requirement, such duty is not unlimited nor does it make the carrier an absolute insurer against any contingency which might result in injury or loss of life.

The phrases "proper condition and safe to operate" and "unnecessary danger to life and limb" should be given the usual and ordinary meaning attached to such words having due regard for the connection in which they are employed and construed in connection with the remaining sections of the Act. *In other words, does this phrase impose on the carrier the duty of equipping an engine so as to protect and insure an engineer against the consequences of his own negligence?* It must be remembered that upon this record this engine was turned over to Groeger in "*proper condition and safe to operate*" and that he himself permitted a condition of low water and created the danger.

An examination of the other sections of the Boiler Inspection Act supports this view of the law: For example the closing phrase of Section 2 provides:

“And all boilers shall be inspected from time to time in accordance with the provisions of this act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.”

An examination of Sections 3, 4 and 5 shows that there is thereby created an organization of inspectors including a chief inspector. With this official the carriers are directed to file their rules and instructions for the inspection of locomotive boilers (Section 5). Thereafter the Interstate Commerce Commission upon hearing must approve such rules and instructions. In fact, the provisions of Sections 5 and 6 indicate an intent on the part of Congress to have not only the matter of boiler inspection but also the matter of boiler construction determined and passed on by the Interstate Commerce Commission. In this connection the following significant language appears in Section 6:

“His (referring to the inspector) first duty shall be to see that the carrier make inspections in accordance with the rules and regulations established or approved by the Interstate Commerce Commission and *that carriers repair the defects which such inspections disclose before the boiler or boilers or appurtenances pertaining thereto are again put in service.*” (Italics ours.)

Again:

“When any district inspector shall in the performance of his duty, find any locomotive boiler or apparatus pertaining thereto *not conforming to the requirements of the law or the rules and regulations established and approved as hereinbefore stated,*

he shall notify the carrier in writing that the locomotive is not in serviceable condition and thereafter such boiler shall not be used until in serviceable condition."

This and other provisions of the various sections of the Boiler Inspection Act clearly in our opinion, therefore, disclose an intent by Congress that the Interstate Commerce Commission should be clothed with a greater authority and duty than merely an inspection of boilers and providing rules and regulations in that regard. The right to inspect and regulate includes, we submit, the authority to say and determine what constitutes a defect or unsafe condition, otherwise the Inspection Act is without meaning. The act would be a futile thing if upon inspection the Commission could not deal with a defect or unsafe condition developed by such inspection. But as pointed out in the provisions just quoted the Commission is expressly given the authority to hold out of service any locomotive boiler or apparatus—

"not conforming to the requirements of the law or the rules and regulations, etc."

We, therefore, submit that the question of whether a boiler not equipped with a fusible plug was a violation of Section 2 of the Act was a question for determination by the Interstate Commerce Commission under the power given and duties imposed upon it by the sections above referred to. That this question was one for the Commission and not for the Court, much less the jury, is, it seems, clearly established by the decisions of this Court in an analogous situation involving the authority of the Commission to regulate tariffs and rates under the Interstate Commerce Act. Here the question is primarily within the jurisdiction of the Commission. *Texas & Pacific Railway Co. vs. Am. Tie Co.*, 234 U. S.

138; *Director General vs. Viscos Co.*, 254 U. S. 498. Hence the Commission not having required a fusible plug (Rec. 57) its absence cannot be so made the basis of a claim of violation of the act.

It is to be kept in mind, moreover, that the non-use of a fusible plug by the Company does not involve dangerous or defective construction so far as the boiler or locomotive itself is concerned; nor does it involve a question of inadequate or defective design, or the use of improper appliances in the make-up or construction of the particular boiler. This case involves solely the non-use or absence in a boiler of an appliance otherwise unnecessary, the use of which is to protect the engineer from the result of his own negligence and disregard of duty owed not only to his employer but also to his fellow employees. In this connection the Court will again recall that the Company had turned this engine over to Groeger in first class condition so far as the operating appliances, gauge cocks, water glasses, etc., were concerned, and it therefore follows that Groeger had at hand all the necessary appliances by means of which he could determine and control the height of the water in this boiler and thus prevent the disaster which occurred.

The error into which the Court fell resulted, we submit, from (1) its construction of the terms of the Boiler Inspection Act and (2) its assumption that under the the act so construed the failure of the Interstate Commerce Commission to require a fusible plug left the question open to each jury in a particular case to say whether or not the use or non-use of this kind of an appliance was or was not negligence; and (3) the Court's misapprehension of the scope of the decision in *Railway Co. vs. Donaldson, Admx.*, 246 U. S. 121.

An examination of this case will show that while the non-use of a fusible plug was assigned as negligence the *question of the validity, scope and intent of the Boiler Inspection Act was not considered nor did the record present as this record presents, any question in that regard*. While it is true that the non-use of a fusible plug is mentioned in the opinion the case turned on the question of defective and unsafe construction.

The locomotive boiler involved in the *Donaldson* case appears to have been equipped with button headed crown sheet bolts proper in a coal burning engine but improper and unsafe when oil was used for fuel. No change in this construction was made when a change in fuel from coal to oil was made.

Furthermore, so far as the question of a fusible plug was concerned the evidence of the plaintiff was to the effect that *the water was not low, i. e., that the explosion was not due to low water. This was disputed and the jury having found for the plaintiff it is to be assumed that the failure of that particular boiler was not due to low water. Hence the question of use or non-use of a fusible plug which only functions in the event of low water was not only not involved as a matter of law but also not in the case as a matter of fact*. In the case at bar there is no question but that the explosion was due to low water. The question here is, who was responsible for the condition of low water?

The case clearly distinguishes itself from the case at bar. The question which the jury in the *Donaldson* case had to determine was whether or not a particular form of construction was in fact unsafe. The Supreme Court held that this was an open question for the jury and that the failure of a boiler inspector to

disapprove such construction was not conclusive on that point. This ruling is clearly not inconsistent with our views hereinbefore expressed as to the scope of the Boiler Inspection Act. We are not claiming that the failure of the Inspector, for example, to discover on inspection a defective condition of a particular engine would constitute a defense to the carrier when a boiler failure resulted from a defect which the inspector overlooked. Nor do we claim that the failure by an inspector to disapprove the non-use of a fusible plug would be a defense in this case, and the Court will remember that in the *Donaldson* case the evidence failed to show an approval of the construction there employed. (p. 127).

Our contention goes deeper: It is, in substance, that when a locomotive boiler is in all other respects—

“in proper condition and safe to operate * * *”
and “may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb”

the non-use by the carrier of an appliance which might protect the engineer of the locomotive from the consequences of his negligent operation of an otherwise safe engine is not and may not be held to be a breach of duty under the Boiler Inspection Act, which does not require a fusible plug either expressly nor through regulations in force pursuant to the provisions of such act.

The question here involved is purely one of law—the non-use of a fusible plug in this boiler was admitted by the Company, which in addition to the fact that the Commission did not require fusible plugs showed that it was not used by various standard railroad systems, such as the New York Central, The Chicago, Burlington & Quincy, The Illinois Central, Baltimore and Ohio and The New York, Chicago and St. Louis (Nickel Plate).

Likewise, it appears that The American Railway Master Mechanics Association, an association of motive power officials from nearly all the railroads of the country, have by resolution gone on record against the use of a fusible plug. (Rec 39).

If the mere absence of a fusible plug from a locomotive boiler safe in all other respects is to be left to the jury to say that such constitutes a violation of the Federal statute requiring locomotive boilers to be in proper condition and safe to operate, the jury will also be given the duty to ascertain whether the presence of such a safety device is a violation of the statute where injury results therefrom. Where an injury results from a fusible plug melting and shooting steam into the fire box of the locomotive, as is likely to occur (testimony of McGann, Rec. 16) the trial Court would have to leave to the jury the question of whether the presence of such plug was a violation of the Boiler Inspection Act. *A jury might very well hold that the installation of a plug was a violation of the statute since they apparently are not in general use and have been condemned by The American Railway Master Mechanics Association.* Thus, whether a railroad company installs or fails to install a fusible plug it is at the mercy of a jury which is permitted to find that either its presence or absence is a violation of the Federal statute which imposes an absolute liability on the company in case injury results from a breach thereof. Obviously it was the design of Congress that the statute should be given a consistent application by rules promulgated by the Interstate Commerce Commission and not that juries should place varying and inconsistent interpretations thereupon, making carriers liable regardless of whether they installed or failed to install some particular safety device not spe-

cifically required by the statute or regulations adopted thereunder.

C. The Court erred in charging the jury with regard to asserted obligation of defendant to avail itself of the best mechanical contrivances and inventions in known practical use which are or might be effective in making the locomotive safe as against explosion.



The trial Court charged that such was the defendant's duty, using the following language:

"An interstate carrier, as well as any railroad carriers, owes the duty, of course, of availing itself of the best mechanical contrivances and inventions in known practical use which are or would be effective in making safe a locomotive boiler as against explosions. It is not bound to introduce a new appliance the moment somebody suggests it or discovers it, but is entitled to a reasonable time and opportunity to test it out and make any changes.

"Such I conceive to be the rules under which you are here to determine whether or not the standard of duty in making this engine safe did or did not require installation of a fusible plug. I say to you it is and was the duty of the defendant to avail itself of the best mechanical contrivances and inventions in known practical use which were or are effective in making the boilers safe as against explosions. * * * If you shall find, under the charge that I have given you, that a fusible safety plug was required by that standard, and that it was a mechanical means and contrivance in known practical use and effective more than was any other that had been installed by the defendant on this engine, then its absence would be a violation of the Boiler Inspection Act, and if the explosion resulted in whole or in part because of the absence of the fusible plug, and the decedent thereby met his death, plaintiff would be entitled to recover."

This definition of duty again raises the question of the existence, extent and nature of the obligation imposed by the Boiler Inspection Act and is erroneous if the propositions heretofore urged by us in that regard are correct. We claim, however, that this charge is otherwise erroneous. In other words we do not believe that the defendant is bound under the Boiler Inspection Act however construed to install the best mechanical devices to insure the safety of the boilers of its locomotives and that the Court erroneously made the standard of its duty dependent upon the practice of other carriers which is not the standard attempted to be imposed by the statute.

The Boiler Inspection Act in Section 2 prohibits the use of locomotive engines unless the boilers thereof "are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier * * * without unnecessary peril to life or limb." The statute thus attempts to define and establish the standard of the defendant's duty. The common law rule in force prior to the adoption of such statute required a common carrier to use ordinary care in providing and maintaining equipment reasonably safe and suitable for the use of it employes. Congress by the Boiler Inspection Act obviously designed only to make such duty absolute rather than qualified as being based on negligence. The evident legislative purpose was to impose liability on carriers if injury resulted from their failure to furnish locomotive boilers which were reasonably safe, i. e., not unnecessarily dangerous, regardless of whether they were negligent in doing so or not. The duty imposed by the common law upon railroad companies is now absolute instead of being based on negligence but the character of



the appliances they are required to furnish remains the same, that is, reasonably safe and suitable for the use of their employes and not unnecessarily dangerous to them. The failure to furnish a locomotive with a reasonably safe boiler is negligence *per se* but the statute does not require that the boiler furnished be of any different character than was required at common law.

That Congress by the adoption of the Safety Appliance Act and the Boiler Inspection Act merely changed the duty from a qualified one based upon negligence to an absolute one is evidenced by several decisions of this Court.

In *San Antonio Ry. Co. vs. Wagner*, 241 U. S. 476, 484, this Court stated with reference to the Safety Appliance Act:

"If this Act is violated, the question of negligence in the general sense of want of care is immaterial. 241 U. S. 43, and cases there cited. But the two statutes are *in pari materia*, and where the Employers' Liability Act refers to 'any defect or deficiency, due to its negligence, in its cars, engines, appliances,' etc., it clearly is the legislative intent to treat a violation of the Safety Appliance Act as 'negligence',—what is sometimes called negligence *per se*."

The court in *Louisville & Nashville R. R. vs. Layton*, 243 U. S. 620, stated with reference to the same statute:

"By this legislation the qualified duty of the common law is expanded into an absolute duty with respect to car couplers and if the defendant railroad companies used cars which did not comply with the standard thus prescribed they violated the plain prohibition of the law, and there arose from that violation a liability to make compensation to any employee who was injured because of it."

In *St. Louis, I. M. & S. Ry. Co. vs. Taylor*, 210 U. S. 281, the court held:

"In the case before us the liability of the defendant does not grow out of the common law duty of master to servant. The Congress, *not satisfied with the common law duty and its resulting liability*, has prescribed and defined the *duty by statute*. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was *to supplant the qualified duty of the common law with an absolute duty deemed by it more just.*"

The above language was quoted with approval in *C. P. & Q. Ry. Co. vs. U. S.*, 220 U. S. 559.

It thus appears that the only change made by the Boiler Inspection Act is in the abrogation of the requirement of negligence as a condition of the defendant's liability. The duty of the carrier is not absolute but the character of the equipment it is required to furnish is the same and if under the common law and the Federal Employers' Liability Act there was no requirement that a carrier avail itself of the best mechanical contrivances and inventions in known practical use, there is no such requirement now and the charge of the court was erroneous and prejudicial.

That there was no such requirement existing under the common law or the Federal Employers' Liability Act is clearly disclosed by the language of this Court in *Chicago & Northwestern R. R. vs. Bower*, 241 U. S.

470, 473. There action was brought under the Federal Employers' Liability Act, it being asserted that the defendant supplied the plaintiff with a locomotive containing certain defective appliances. The Court stated:

"The rule of law is: That the employer is under a duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the employe, *but is not required to furnish the latest, best and safest appliances, or to discard standard appliances upon the discovery of later improvements, provided those in use are reasonably safe and suitable. Washington, etc. R. R. v. McDade*, 135 U. S. 554, 570; *Patton v. Tex. & Pac. Ry.*, 179 U. S. 658, 664." (Italics ours.)

In *Washington R. R. vs. McDade*, 135 U. S. 554, 570, it was held:

"The general principles of law by which the liability of an employer for injuries to an employe, growing out of defective machinery, is tested are well settled by those decisions. Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employes. *Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed.* They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter." (Italics ours.)

To require a carrier to avail itself of the best mechanical devices in known practical use is to measure its duty by the practice of other carriers and not by the standard established by law. The equipment of other carriers may go beyond a compliance with the duty im-

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posed upon the defendant or it may fall short of compliance therewith. The law requires locomotive boilers reasonably safe and in proper condition and not unnecessarily dangerous. That is the standard and although the practice of other carriers may be evidence of a compliance or a failure of compliance therewith the standard is not defined or established by such practice. If the equipment used by a carrier complies with this standard it has discharged its duty and the fact that other carriers employ other equipment which to some juries might seem more or less dangerous than that used by the defendant, is immaterial. Obviously the practice of other carriers is evidence alone of the compliance or failure by the defendant with its duty but it does not define or fix the standard of such duty.

As stated in *Wigmore on Evidence*, Sections 459 to 461:

"Another objection that may occur is that the conduct of another person is not to be taken as a *standard determining legal duty*. This is undoubtedly true; but it is easy to distinguish between the conduct of another person as a standard of duty and the same conduct merely as evidence of the nature of the thing which is the subject of the duty.

* * * The distinction is itself a simple one. (1) The conduct of others evidences the tendency of the thing in question; and such conduct—e. g., in using brakes on a hill, felt shoes in a powder factory, railings around a machine, or in not using them—is receivable with other evidence showing the tendency of the thing as dangerous, defective, or the reverse. But this is only evidence. The jury may find from other evidence that the thing was in fact dangerous, defective, or the reverse, and that its maintenance was or was not negligence, in spite of the above evidence. (2) Meanwhile, the substantive law tells them what the standard of conduct for negligence

is; and this standard is a fixed one, independent of the actual conduct of others. To take that conduct as furnishing a sufficient legal standard of negligence would be to abandon the standard set by the substantive law, and would be improper. This conduct of others, then, (1) is receivable as some evidence of the nature of the thing in question, because it indicates what is the influence of the thing on the ordinary person in that situation; but (2) it is not to be taken as fixing a legal standard for the conduct required by law."

In *Texas & Pac. R. R. vs. Behymer*, 189 U. S. 468, this Court held that whether the defendant railroad company operated a train in the usual and ordinary way was not the criterion of its liability for resulting injury, saying:

"What usually is done may be evidence of what ought to be done but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."

Wabash R. R. Co. vs. MacDaniels, 107 U. S. 454;

Shandrew vs. Chic. Mil. & St. Paul R. R., 142 Fed. 320;

Midland Valley R. R. Co. vs. Bell, 242 Fed. 803.

Similarly in this case what equipment the defendant ought to have furnished is fixed by the standard established by law and what equipment other carriers furnish is, if anything, evidence alone of compliance or failure of compliance with such standard and the practice of other carriers does not establish the standard of defendant's duty. By statute the defendant is required to supply locomotives in proper condition and safe to operate and not unnecessarily dangerous. Such is apparently defined by the pre-existing common law rule as requiring

merely reasonably safe equipment and appliances. Clearly under the decisions above noted defendant was not required to furnish the best and safest equipment known nor was it required to adopt and use the best equipment in known practical use. The practice of other carriers is material only as evidence and the Court erred in charging the jury that the defendant was required to furnish the best equipment in known practical use to insure its boilers as against explosions.

D. The only remaining question in the case relates to the claim of the plaintiff based on the admitted condition of seven stay-bolts in this boiler and we proceed to a discussion of this proposition, to-wit:

The Court erred in leaving to the jury the question of whether or not the crown sheet of the boiler was in a dangerous or defective condition—this for the reason that there was no evidence in support thereof.

The trial court it will be remembered and as disclosed by the charge to the jury took from the jury the second and sixth assignments of negligence and consolidating the remaining claims of negligence limited plaintiff's case to the jury to two propositions. One of them involving the fusible plug has heretofore been discussed. The second was based on the fact admitted by defendant that prior to the accident there were in the boiler seven broken stay-bolts. (Rec. 13). Their location is plotted on defendant's model, Exhibit 1 (Rec. 35). As hereinafter disclosed these stay-bolts were not in any sense a contributing factor in this explosion—a fact respecting which there was no issue between plaintiff's and defendant's witnesses.

The charge of the Court on this branch of the case was as follows:

“(1) Did the defendant permit or allow a dangerous, unsafe and insufficient condition to be and arise in and about the crown sheet of said boiler whereby it was weakened and became defective, unsafe and leaky; whether that was due to any or whatever cause, broken crown or stay-bolts or other causes, and if so, was the boiler explosion thereby caused in whole or in part. Plaintiff asserts that, and the defendant denies it. It will be for you to say under the evidence here, gentlemen, and the law as I state it to you, what the fact is in this respect.”

The Court further charged (Rec. 59):

“And by the proximate cause in that connection is meant a cause except for the existence of which the explosion would not have occurred. To be more specific, and as applied to one aspect of the case, complaint is made that in the crown sheet of this boiler there were six broken stay-bolts and one crown-bolt, and that two of these broken stay-bolts were adjacent to each other, whereas the inspection requirements of the Interstate Commerce Commission regulations forbid the use of an engine under the Boiler Inspection Act when there are five or more broken bolts, or where there are two broken bolts contiguous to each other. Even if it should be proved that that requirement of the law was violated, the plaintiff would not be entitled to recover by reason of such violation unless you should further find from a preponderance of the evidence that this specific violation, these specific defects, was either the sole or one of the causes but for the existence of which the explosion would not have taken place. If the existence of these broken stay-bolts had nothing to do with causing the explosion, then you should disregard their existence because, as I say to you, the negligent or wrongful conduct which you may find by a preponderance of the evidence the defendant is guilty of, must have been either the sole or one of the proximate causes of the explosion and of the resultant death of plaintiff's decedent.”

Irrespective of the question heretofore discussed as to whether this states the proper definition of the duty imposed on defendant by the Boiler Inspection Act, we claim that there was no evidence warranting the court in submitting to the jury any question as to the unsafe and defective condition of the boiler or the crown sheet therein, and that such action was therefore erroneous and prejudicial.

The record in this case contains practically a complete history of this engine so far as its condition and matters of inspection are concerned, from June, 1920, until September 3, 1920, at which time the engine was turned over to Groeger for the trip on which the explosion occurred. For example, on June 5, 1920, engine No. 2541 was given a general overhauling and repair, as shown by defendant's Exhibit No. 12 (Rec. 67 to 69). The character of this overhauling is evident from the subject-matter of defendant's Exhibit 12 and is described by witness McGann (Rec. 51 and 52). In addition to this semi-annual overhauling and report thereof, the Interstate Commerce Commission regulations require a monthly locomotive inspection and repair report. This was done on August 11, 1920, about three weeks prior to the accident, as shown by defendant's Exhibit 6 (Rec. 63). The character of this inspection and repair is shown by that exhibit and is also described by witness Cecil (Rec. 39) and witness Dixon (Rec. 44). This latter witness also describes the process of washing a boiler (Rec. 44 and 45). In railroad language, the process of inspecting and repairing an engine called for by the monthly inspection report (Defendant's Exhibit 6, Rec. 63) is known as "forming" an engine (Rec. 43) and is also further described by witness Hooper (Rec. 43).

It also appears that the boiler of this engine was washed on August 5, August 21 and August 30 (Rec. 44). In connection with these reports, the various witnesses who took part in the inspection and repairs made and thus reported, testified as to what was done (testimony of Cecil, Rec. 39; Brewer, Rec. 40; Kennedy, Rec. 42; Hooper, Rec. 42; Dixon, Rec. 43). In addition to these employees, two engineers of the Company (already referred to) who operated this engine immediately prior to Groeger's trip, testified regarding the condition of the engine. For example, Howard Lisle (Rec. 46) testified that he as an engineer operated this engine on the 29th, 30th and 31st, and that

"while I was operating the engine on the 29th, 30th and 31st of August, I did not have a bit of trouble with the injectors. The gauge cock was O. K. and the water glass. You can check the water glass against the gauge cocks and the gauge cocks against the water glass. They correctly show the height of the water."

T. E. Peele (Rec. 45) says:

"I had it (engine No. 2541) out of Holloway on the 31st of August * * *. I was hauling a freight train * * *. When I had that train on the 31st of August the condition of her gauge cocks was good and her injectors were good. I did not have any trouble or notice any defect in the water glass. Her steaming qualities, as far as being an efficient engine is concerned, were good."

J. W. Hamilton, engineer (Rec. 41) had the engine on the day preceding the explosion, and testifies that he made out a work report (Defendant's Exhibit 8, Rec. 65) at the conclusion of his run, calling attention to what trouble had developed during the run which ended at 1:30 p. m. on September 2nd. After describing the engine, Hamilton testifies:

"When I operated that locomotive she was a good locomotive, one of the best we had."

With respect to water conditions, W. J. Dixon, a witness on behalf of plaintiff, testified that the water conditions at Holloway, Fairport, Bridgeport and Benwood were good (Rec. 9).

The foregoing testimony, which is not disputed, constitutes, with the exception hereinafter referred to, the proof respecting the condition of this engine and these appliances when it was turned over to Groeger prior to his trip.

The exception above referred to is with regard to certain stay-bolts which were found after the explosion to have been broken, and which, according to the evidence, were broken prior to the accident. (Rec. 13.)

With respect to these stay-bolts, it appears from the record that under the regulations of the Interstate Commerce Commission no engine may be used where it has more than five broken bolts, or where it has two broken bolts which are adjacent to each other (Rec. 22, 37 and 59). In this case there were six intermediate stays, two of which were adjacent, and one stay-bolt at the forward part of the crown sheet, broken. The location of these broken bolts is described on page 13 of the record.

There is in this record, however, not a scintilla of evidence to the effect that the broken bolts (which appeared from their condition to have been broken prior to the accident) had any connection whatever with this explosion. *Expert witnesses for plaintiff and defendant agree in this conclusion.* For example, Charles McGann testifying on behalf of both plaintiff and defendant says (Rec. 16):

"These stay-bolts had no contributing cause toward the failure whatever."

and in the Record, page 50, further says:

"In my opinion those broken bolts contributed none whatever to the tear of the crown sheet and the consequent explosion of the boiler."

The opinion of John A. Boyden is indicated by the following question and answer (Rec. 22):

"Q. Now, supposing after a tear or boiler explosion, the tear in the crown sheet was located by those who inspected the engine after the explosion, and suppose that that tear was not adjacent, nor did it come inward near the bolt or two bolts, that were broken, but that the tear pulled out good bolts, pulled off the good bolts, you would have some difficulty, would you not, in coming to the conclusion that these other broken bolts were a contributing factor to that boiler failure? A. I would."

Charles A. Karnell, an expert from the New York Central Railroad Company, testified (Rec. 31):

"The three stay-bolts as they are marked as broken there on each side, were not a contributing factor to the explosion, due to the fact that the solid stays had to let go first before they could come to this."

Walter C. Hedeman (Rec. 35) testifies as follows:

"Q. Now, Mr. Hedeman, having that in mind and having in mind the location of those seven bolts, in your opinion as a boiler expert, could those seven bolts be considered as even a contributing cause to that boiler failure?"

"A. Absolutely not."

In other words, as one witness affirms:

From the appearance of the crown sheet, the boiler would have exploded if these broken stay-bolts discovered thereafter, had been intact prior to the explosion. (Rec. 16.)

In addition to the testimony of these men (and it will be recalled that McGann had the opportunity of examining the bolts and engine shortly after the explosion) the circumstantial evidence with regard to the point where the boiler failure started absolutely excludes any theory or idea that these broken stay-bolts contributed in any way to this explosion. For example, McGann making an examination within three hours after the explosion occurred found on the crown sheet the peacock blue coloring, which in itself is conclusive evidence of the overheating of the crown sheet in the area thus colored. (Rec. 50.)

Joseph A. Boyden, witness for the plaintiff, also testifies that a blue area on the crown sheet indicates that the crown sheet has become exposed due to low water. The testimony of Karnell (Rec. 31), and Hedeman (Rec. 35) is to the same effect. The testimony of Hedeman (Rec. 35) and McGann (Rec. 50 *et seq.*) shows that the cause of the explosion was the low water and that the place of the tear and the condition of the bolts from which the crown sheet was separated by the force of the explosion and the relation of such bolts to the six broken stay-bolts conclusively establish that these broken bolts could not possibly have been involved in this boiler explosion.

We, therefore, submit that upon this record there is no more basis for the claim that these stay-bolts contributed to this boiler failure than, we suggest, that a broken bell clapper on the engine (if such were the fact) could be said to be proximately involved in an explosion of the locomotive boiler.

The error of the Court below in this regard is evidenced by its charge to the jury hereinbefore quoted.

We desire to point out that the error of the Court in submitting to the jury a question in support of which there is no evidence in the record was emphasized by the fact that not only did the Court submit this question of broken stay-bolts to the jury, but in connection with that submitted to the jury the question of whether or not the crown sheet of said boiler was "weak, defective, unsafe and leaky * * * due to having previously been overheated." There is absolutely no evidence in the record that this crown sheet had been previously overheated.

We desire to suggest in this connection that the only testimony regarding any defective condition related solely to these stay-bolts and submit that aside from our position that there is no evidence to support the claim that the broken stay-bolts had any causal connection with the explosion, the necessary effect of the Court's instructions in regard to the condition of the engine was to connect with the matter of broken stay-bolts the claim of the plaintiff in regard to want of inspection and previous overheating of the crown sheet to support which no evidence was attempted to be introduced by the plaintiff.

CONCLUSION.

Summarized, the entire evidence in this case leads to but one conclusion: *That Groeger, the engineer and therefore the one in charge and control of this engine and whose duty not only to the defendant but also to his fellow employes required that he properly use the adequate means at hand to properly operate the locomotive and maintain the proper height of water in the boiler, failed to do so and caused this disaster, resulting not*

only in the loss of his own life but the lives of two fellow employes.

The case is clearly within the rule laid down by this Court in *Great Northern Ry. vs. Wiles*, 240 U. S. 444, from which we quote as follows:

“Where there is nothing to extenuate the negligence of the employe, or to confuse his judgment, and his duty is as clear as its performance is easy, and he knows not only the imminent danger of the situation, but also how it can be averted by complying with the rules of the employer, there is no justification for a comparison of negligences on the part of the employer and employe or the apportioning of their effect under the provision of the Employers’ Liability Act. To excuse such neglect on the part of an employe of an interstate carrier would not only cast immeasurable liability on the carriers but remove security from those carried.”

We, therefore, submit that the judgment below should be reversed and a new trial granted.

Respectfully submitted,

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